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Sea Warfare and International Law During the Late War

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I. PERIOD UP TO FEBRUARY 4, 1915.

1.

The Belligerent Powers and the London Declaration.

Germany and the London Declaration.

At the outbreak of the war, the London Declaration had already been signed, but had not yet been ratified. In its introductory provision it was, however, set forth that the signatory powers were unanimous in the statement that the rules contained in the declaration were substantially in accord with the generally recognized principles of international law.

Germany, in accordance with this statement, published in the Imperial Law Gazette issued on August 3, 1914, the German Prize Ordinance, which contained all the rules of the London Declaration without any restriction, and partly even in verbal transcription. Austria-Hungary had already adopted the London Declaration without any modification in May, 1913, as an annex to the service regulations for the Imperial and Royal Navy in the case of a war.

On August 5, 1914, the British Government, by an order in council, published a contraband list, which deviated in certain respects from the list of the London Declaration.

No statement was, however, made as to whether the British Naval forces would be instructed to comply in other respects with the principles of the London Declaration.

On August 6th the Government of the United States submitted by cable a proposal to all belligerent governments, that they should during the war regard the provisions of the London Declaration as binding.

Austria-Hungary answered on August 13th, and Germany on August 19th, accepting this proposal.

2.

Order in Council of August 20, 1914.

England and the London Declaration. Order in Council of August 20, 1914.

Of the allied governments Russia was the first to communicate to Washington by cable on August 20th, that whilst reserving decision until Great Britain had taken action in the matter it was not expected that the British Government would decide to observe the rules of the London Declaration. On August 22, the British Government transmitted to the American Ambassador in London a note, to which there was attached a copy of the British Order in Council of August 20, 1914, and of the memorandum accompanying this Order, which memorandum contained the following statement:

> "(*His Majesty's government*) *have decided to adopt generally the rules of the declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations.*"

These modifications and additions referred in the main to the following

1. The principle of continuous voyage is applied also to conditional contraband.

2. Enemy destination can be inferred from any evidence considered sufficient.

3. The presumption of enemy destination will be assumed, in addition to the cases contemplated in the London Declaration, in case the goods are intended for, or are consigned to an agent of the enemy State, or to any person under the control of the authorities of the enemy State.

4. The General Report issued in connection with the London Declaration is acknowledged as binding.

Criticism of the provisions of the Order in Council.

The London Declaration had with reference to the two most important subjects of International naval war Law, namely, the Law of Contraband and the Law of Blockade, established such principles as, in the opinion of the States participating in the Conference, represented the generally

accepted legal viewpoint and the acknowledged rules of the Law of Nations. Under these it was acknowledged that the principle of continuous voyage should be applicable to absolute contraband, which would thus be subject to seizure if proved to be consigned to an enemy country, even though a neutral port be touched before such enemy country is reached. To conditional contraband this principle was, however, not to apply, so that cargoes of this nature on their way to a neutral country were not to be subject to seizure.

The Law of Blockade as adopted in the London Declaration is based upon the principles of the Declaration of Paris. Under these a blockade in order to be binding must be effective and may, furthermore, under no condition bar access to neutral ports. No ship can be accused of breaking the blockade that is on its way to a port which is not blockaded, whatever may be its further destination or that of its cargo. The principle of continuous voyage thus finds no application in the case of blockades. This rule had in particular been maintained by the British Government to represent the existing status of International Law, and had been upheld by it at the Conference as such.

The modifications and additions enacted by the Order in Council did not affect the main principles of the law of blockade. But although such law, as established by the London Declaration, thus so far remained in force, this was of no practical importance, as a blockade was never declared. The law of contraband, however, which in view of the existing conditions of naval warfare was alone of importance, underwent so extensive alterations that it had no longer anything in common with the Rules established by the Declaration of London. This particularly refers to the new provision that the principle of continuous voyage should also apply to conditional contraband.

Now, it is to be noted in the first place that according to English law a provision of this nature could not be enacted by an order in council. According to English legal principles only such rules can be established by

means of an order in council as binding upon British Prize Courts, as are in accordance with International Law, or render the provisions of International Law less stringent (see Judgments of the Privy Council in the "Zamora" and "Hakan," Trehern-Grant Prize Cases, Vol. 2, pp. 1 and 479); also the "Proton" of March 15, 1918). Such was not the case in the present issue, because the application of the principle of continuous voyage to conditional contraband, far from alleviating the provisions of International Law, made the same more severe. The theory of continuous voyage was in fact not known to International Law at all as a generally acknowledged principle.[1] Such wide extension of the principle has, as was expressly pointed out in the British memorandum submitted to the London Conference, only been resorted to in the Prize Courts of the United States of America, but never in England, as is explicitly set forth in the British memorandum laid before the London Conference, apart from the fact that such principle has been rejected with practical unanimity by European writers on International Law. New principles of International Law, however, can only arise through general recognition, and not by the mere fact that an individual belligerent applies certain principles which serve his interest in warfare.[2]

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[1] This applies in particular to the conception of English Law. Thus in the Manual of Naval Prize Law, edited by Lushington in 1866 under orders of the Lords Commissioners of the English Admiralty, and likewise in the New Edition of 1888, prepared by Holland, the following passage is to be found: "The destination of the vessel is conclusive as to the destination of the goods on board * * * if the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination, to be attained by transshipment, overland conveyance, or otherwise." Holland points out in a footnote that American Prize Courts took up a different attitude during the Civil War.

[2] See Oppenheim, International Law, Vol. 1, p. 24: "Decisions of Prize Courts and of Municipal Courts as well as the opinions of famous writers, and certain municipal laws may constitute factors exerting an influence on the gradual establishment of new principles of International Law. They do, however, not constitute the historical facts from which such rules receive their legal force."

Nor is the second fundamental provision of the order in council in better conformity with the general principles of International Law. According to those principles only such evidence may be made use of in order to establish the presumption of enemy destination which leads to seizure as contraband, as is found on the detained vessel herself, but not evidence taken from other sources.[3]

A provision, such as the one contained in the order in council, opens a wide door to arbitrary conduct, because the sources from which the evidence originates can never be checked and verified.

The third provision, finally, does away with the distinction between absolute and conditional contraband completely.[4] Under the interpretation given to this provision any person residing in Germany was to be regarded as being under the control of an enemy authority. Thus every shipment directly consigned to Germany was subject to the presumption of enemy destination, and therefore liable to seizure. It being, on the other hand, rendered impossible for enemy citizens to pursue their rights before British Prize Courts, unless they could rely on one of the Hague Conventions, the condemnation of all such shipments was not only unavoidable, but the further consequence also naturally arose that conditional contraband could no longer be shipped even to private parties in Germany. In a like manner, however, the shipment of conditional contraband to Germany through a neutral country was also rendered impossible, because here the prin-

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[3] See the note of the United States to the British Government of November 5th, 1915, as well as the "Memorial on Prize Procedure" of Lee, Paul, Ryder and Murray:

"By the maritime law of nations universally and immemorially received, there is an established method of determination whether the capture be, or be not, lawful prize. * * * The evidence to acquit or condemn, with or without costs and damages, must, in the first instance, come merely from the ship taken."

[4] See the "Times History of the War," Vol. 7, p. 402: "The first thing to do was, therefore, to make conditional contraband capturable on a basis analogous to the principle governing the capture of absolute contraband. This was done by Order in Council of August 20th, which provided that * * *" etc.

ciple of continuous voyage became applicable. Thus the importation of conditional contraband to Germany was rendered impossible in a like manner as the importation of absolute contraband. That such a situation was contrary to the generally recognized principles of International Law, goes without saying.

The same conditions applied also to the importation into neutral countries of contraband goods intended for neutral consumption. Since the evidence supporting the presumption of enemy destination could be derived from any source whatsoever, no merchant could ever know beforehand whom the enemy government would consider as an agent. This provision was, therefore, bound to lead to a general feeling of insecurity and uncertainty, the consequence whereof must be that gradually the entire export and import trade had to submit to the control, and thus also to the requirements, of the British Government, in order to be safe from interference.

It is thus apparent that by means of these modifications and additions enacted by the Order in Council there had been eliminated from the Law adopted by the London Declaration, all those rules that did not suit the interests of English naval warfare at that time.

Attitude of Foreign States toward the Order in Council of August 20th, 1914.

Under such circumstances, it is easy to understand why the Russian Government in their aforementioned cable gave expression to the opinion that England would not adhere to the principles of the London Declaration. But also the neutral governments distrusted the British Government's declaration that they would adhere to the London Rules. This is shown by the official publication of the Dutch Government in the "Recueil de diverses Communications due Ministre des Affaires Etrangères aux Etats-Généraux par rapport à la neutralité des Pays-Bas et au respect du droit des gens," The Hague, September 1916, which runs as follows:

> *"These modifications and additions in practice rendered almost entirely illusory all guarantees which the London Declaration had given to trade and to neutral shipping against the possible arbitrary con-*

duct of the belligerents in the matter of transportation of conditional contraband. Furthermore, they did away with any distinction in the treatment of absolute and conditional contraband."

Purpose of the Order in Council August 20, 1914.

The foregoing considerations not only show the effect of the Order in Council; they likewise reveal the purpose for which it was enacted. This purpose had been already frankly stated by the British Government on August 22nd in the aforementioned memorandum, in the following words:

> "The peculiar conditions in the present war due to the fact that neutral ports such as Rotterdam are the chief means of access to a large part of Germany, and that *exceptional measures have been taken in the enemy country for the control by the Government of the entire supply of foodstuffs* have convinced his Majesty's Government that modifications are required in the applications of articles 34 and 35 of the Declaration."

The purpose was, therefore, avowedly to bar all imports to Germany through neutral ports, and in particular to block *entirely* all imports of foodstuffs, not merely that destined for military use, from oversea countries to Germany. This purpose is shown beyond all doubt in the reasons given by the British Government for their action. For here it is to be found that such grounds are contradicted by the actual facts: *Foodstuffs in Germany were not placed under Government control until January, 1915.* No governmental action in this respect took place at an earlier date.

If, notwithstanding this fact, such grounds are stated and are relied upon, no other inference can be drawn than that it was from the beginning of the war the firm intention of the British Government to stop the food supply of Germany under all conditions. To this must be added the following consideration: The British Government had merely contended that the foodstuffs in Germany had been placed under Government control. If this had actually been the case, the establishment of a general

presumption of enemy destination for foodstuff shipments to Germany would not have been entirely unwarranted. But the British Government went much further in extending such presumption to all articles of conditional contraband.

By what right did the British Government take such action, since not even the contention of Government control could be maintained with reference to these articles?

There is no reason why the duty resting upon the captor, according to the generally recognized principles of international law of proving the enemy destination in the case of each individual shipment should not have been upheld. Such burden of proof cannot be avoided by the captor through setting up a general presumption in his own favor, on the one hand, and depriving the owner of the cargo of the possibility of offering evidence in rebuttal, on the other hand, by preventing such owner from appearing before the Prize Courts.[5] Such a procedure would be entirely arbitrary! None the less, the British Government adopted such procedure, and thereby clearly showed it to be their firm determination to stop any imports to the enemy country, whether they were destined for military uses or for the civil population, without any regard to the existing rules of International Law. This is, moreover, to be inferred from the grounds stated by the British Government for the modification of articles 34 and 35 of the London Declaration in the Note addressed to the Government of the United States by which the Order in Council was notified to that government, namely, for "the efficient conduct of their naval operations."

It is, therefore, to be placed on record that the clearly apparent purpose of the provisions of the Order in Council was to stop all imports to Germany, in particular, however, any importation of foodstuffs. The aim of the British Government was to starve out the German nation.

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[5] It is to be noted that under Article 2 of the Paris Declaration of 1856 which was not altered by the Declaration of London, enemy property on board a neutral ship is protected in the same way as neutral property and thus only subject to capture under the same conditions as the latter.

3.

The Practice of British Sea Warfare up to October 29, 1914.

Practice of British Sea Warfare.

To the attainment of this purpose were directed all measures of British sea warfare from the first days of the war onward. This, too, is not a mere contention based upon the numerous protests which appeared in the Press of neutral countries in those days; it is borne out by the following statement in the official report of the Dutch Government referred to above:

> "From the first days of the war onward numerous Dutch ships were brought up to English ports by British destroyers on account of their carrying foodstuffs. For the release of the cargoes intended for Rotterdam, the British Government required that in case the innocent destination of the cargo could not be clearly established, the Government of the Netherlands should give a specific warranty to the effect that these foodstuffs were exclusively intended for consumption in Holland, *and also that they were not intended to release an equal quantity of foodstuff for carriage to Germany.*"

The report, which covers the period up to August 22, ends with the following words:

> "The British Government held themselves to be entitled to consider as suspicious all foodstuffs shipped to Rotterdam and to seize same unless the Government of the Netherlands gave the aforementioned warranty."

This statement of the Dutch Government shows that the British Government from the very first days of the war seized foodstuff cargoes intended for Holland without having any proof in hand of their enemy destination, that, instead, the burden of proving innocent destination was placed upon the importers, and that even upon innocent destination being proved, foodstuff cargoes shipped to Rotterdam were not released unless the Government of the Netherlands gave a warranty that they

would not serve the purpose of releasing an equal quantity of foodstuffs in that country.

Thus from the first days of the war an endeavor of the British Government is noticeable to compel neutral governments to submit their export policy to British interests by depriving them of the imports most essential for their respective countries.

After the enactment of the Order in Council of August 20, 1914, the same course was followed. The "Recueil" of the Government of the Netherlands makes the following remark on this point:

> "The consequence was that *all* ships which were on passage to Holland with conditional contraband on board were brought to an English port and detained there for an indefinite time, this being not *until the British Government had proved* that the cargo was liable to seizure, *but until proof to the contrary had been supplied by the parties interested, a proof, moreover, which satisfied the British Government.*"

The Recueil continues:

> "It was almost impossible to give the required proof, firstly because the British Government considered the Dutch ports, and in particular Rotterdam, as importation ports for Germany, and secondly because the British Government required from the consignees the proof that they were under no circumstances agents for the further delivery of the goods to Germany."

Furthermore, the Recueil states:

> "The Government of the Netherlands protested in the case of each detention. *When ultimately certain articles of conditional contraband, in particular foodstuffs, began to become scarce*, the Government of the Netherlands had these articles shipped for their *own* account and to their *own* order, so that the provisions of the Order in Council were complied with and the application of the presumption of enemy destination provided for by the Order in Council was rendered impossible. The Government of the Netherlands, however, refused to give the special warranties

demanded by the British Government because by so doing they would have violated their duties as neutrals."

As to the consequences of such refusal the Recueil reports as follows:

> *"In consequence of this refusal ship after ship was brought to English ports, whence they were not allowed to proceed on their voyage until after a more or less lengthy detention, and in most cases not until they had been compelled to discharge a portion of their cargo."*

On October 5, 1914, the continued efforts of the Dutch Government were for the first time rewarded by a slight success. On this day, as the Recueil reports, the Government of the Netherlands was informed that the British Government had now decided, *pending the enactment of new and final regulations*, not to interfere with shipments of food consigned to the address of a specific person in Holland. This slight relief, which had thus been attained to the advantage of a small portion of lawful neutral trade to Holland, did not, however, last long, as the new regulations announced were enacted on October 29, 1914.

The statements of the Dutch Government cited above show that the measures adopted by British Sea Warfare did not even remain within the rules laid down by the Order in Council of August 20, 1914, although these rules gave rights to belligerency of an extent previously never known. Britain's sea warfare was inspired only by one purpose, namely, to cut off absolutely all imports from Germany. With this aim in view they held themselves entitled to bar even neutral foodstuff traffic until the neutral trade had submitted to the conditions laid down by the British Government.

The above observations on English sea warfare are based, as may again be pointed out, upon official reports of the Government of the Netherlands. Although the other States of Europe which at that time were neutral have not yet published their official correspondence, the

Press of these countries echoed with protests against the arbitrary conduct of England and France, and it was known to all the world that the naval units of both these countries were proceeding against Italian, Norwegian, Swedish and Danish import trade in exactly the same manner as against Holland; and here it is to be noted that the correctness of such press reports was later on corroborated by official notes of the United States of America.

4.

Interference with the Carriage of Passengers on Neutral Ships.

Interference with the carriage of passengers on neutral ships.

As in the case of trade in merchandise, so also in other respects the actions of the British Government and of their naval forces, were not governed by the principles of international law, or by the provisions of the enacted Order in Council, but by the requirements of their operations of war.

According to the principles established in articles 45 and 47 of the London Declaration, only such persons of enemy nationality on board a neutral merchant vessel may be made prisoners of war, as have *already been enlisted in the armed forces of the enemy.* The general report of the London Declaration in its comments to Article 45 states explicitly that both on legal and on practical grounds the entire conference had been unanimous in the recognition of the principle that only persons in *active military service* were liable to be taken prisoners, not however persons who, as for instance, men of the reserve class, wished to return home on a neutral ship in order to discharge their military duties. *In the Order in Council of August 20, 1914, this general report was explicitly stated to have been adopted: consequently the above-mentioned principles established by the report were binding upon the British naval units.* They were moreover in accordance with that which the British Government had always maintained as being sound International Law. Thus at the London Conference, in the

meeting of December 11, 1908, it was declared that England had never admitted the principle that a person under the protection of a neutral flag should be surrendered to the captor. In 1861 the British Government had even taken resort to a threat of war in order to obtain the release of two citizens of the Confederate States who had been removed from the British merchant-man "Trent" by a federal man-of-war, whilst at an earlier date Lord Stowell in the case of the "Friendship" stated the law as follows:

> "It is asked, will you lay down a principle, that may be carried to the length of preventing a military officer in the service of the enemy from finding his way home in a neutral vessel from America to Europe? If he was going merely as an ordinary passenger at his own expense, the question would present itself in a very different form. No British tribunal has ever laid down the principle to that extent."

In spite of this indisputable attitude of the Law, German citizens between the ages of 15 and 55 years, were from the very first days of the war, regardless of whether they were enlisted in the army or not, taken off neutral merchant ships and made prisoners. England thus went beyond not only indisputable principles of International Law, but also her own rules of public law.

5.

The German Memorandum of October 10, 1914.

German Memorandum of October 10, 1914.

Thus a situation of lawlessness on the high seas had arisen which compelled the German Government to issue the following memorandum on October 10, 1914:

> "According to an Order in Council of August 20, 1914, the British Government intends during the present war to adopt the London Declaration of the law of naval warfare of February 26, 1909, with certain additions and modifications. These additions and modifications, however, are of such a nature that they in essential points repeal the London Declaration and thereby violate the existing Law of Nations. Further very material deflections from the London

Declaration are contained in a British Proclamation of September 21, 1921.

I.

"The most drastic modification of the London Declaration is to be found in the provisions concerning conditional contraband set forth under Nos. 3 and 4 of the Order in Council.

"The London Declaration provides in article 33, that the qualification of conditional contraband is to apply only when the goods shipped are intended for the use of an Administrative Office or of the Armed Forces of the enemy State. Furthermore, according to Section 35, the qualification of conditional contraband is in no case applicable if the vessel is bound for a neutral port.

"These provisions, which are substantially in accord with International Law as at present obtaining and are based upon an equitable consideration of the interests of the belligerent States on the one hand and of the neutral States on the other, have been in effect put out of force by the Order in Council. For under rule No. 3 of the Order the presumption of enemy destination of the goods is to apply in any case where the consignee of the goods is under the control of the authorities of the enemy State; this means nothing less than that any shipment bound for an enemy country is liable to seizure because all inhabitants of such enemy country are under the control of its authorities. This provision is supplemented by rule No. 5 of the Order, under which also ships bound for a neutral port can be detained on account of carrying conditional contraband; this means that in direct contradiction of Article 35 of the London Declaration the principle of continuous voyage which under the same is applicable only to the case of absolute contraband, is extended to cover conditional contraband.

"In this way the more lenient rules of the London Declaration concerning conditional contraband are set aside and conditional contraband is in effect placed on the same footing as absolute contraband. Thus the neutral trade engaged in providing the population of a belligerent State with articles of conditional contraband, in particular with foodstuffs, a trade which under the existing Law of Nations is con-

sidered as lawful, is rendered practically impossible, and the interests of both belligerents and neutrals are injured in a manner contrary to International Law. As the events in the theatre of Naval Warfare show, England is proceeding on this point in the most unrestrained manner, so that even the countries bordering on Germany are being put under control, and thus also the food supply of those countries is in danger.

II.

"The British Government consider themselves to be entitled to overrule the lists of absolute contraband, of conditional contraband, and of articles that may not be declared contraband (free list) set forth in Articles 22, 24, and 28 of the London Declaration. In their contraband declaration of August 5, 1914, confirmed by No. 1 of the Order in Council, aeroplanes and their component parts are included among absolute contraband, although, according to Article 24, No. 8, of the London Declaration, such articles may only be treated as conditional contraband. What is, however, still more far-reaching, the British Government have by proclamation of September 21, 1914, declared rubber, hides, and skins, as well as certain kinds of iron ore, to be conditional contraband, although these articles cannot be used at all, or in any case only very indirectly, for war purposes, and have therefore been included in the free list of Article 28 (compare Nos. 3, 4, 6). Thus acknowledged rules of the Law of Nations enacted for the protection of neutral trade in articles of an exclusively peaceful character from interference by belligerents, are openly violated.

III.

"A further encroachment of the law of contraband rules is contained in rule No. 2 of the Order in Council. Article 38 of the London Declaration, following the existing principle of International Law, allows the seizure of a ship for contraband only as long as such contraband is on board the vessel; the British Government, however, claims the right to seize the ship during the whole voyage, if contraband has been carried under false papers. In this manner neutral

shipping traffic with enemy territory is exposed to all kinds of inconveniences, because the ship can be detained not only on the grounds of clearly apparent circumstances, such as the presence of contraband on board, but also on the grounds of a mere allegation, based upon a supposed prior act, which in many cases can not be proven!

IV.

"Through Rule No. 4 of the Order in Council the right of seizure on account of breach of blockade is extended in an unequitable manner, for under this provision the presumption of knowledge of the blockade is to apply to the case of a ship sailing from an unblockaded enemy port after the expiration of a certain period of time since the blockade of another enemy port was notified to the local authorities. Through this provision the British Government seeks to compel the authorities of the enemy State to render service to the British naval forces in a measure going beyond the limits allowed by International Law and to enforce such service by the seizure of neutral ships.

V.

"According to a principle of International Law, confirmed by the London Declaration, only such persons on board a neutral merchant vessel may be made prisoners of war as have already been enlisted in the enemy army. This principle is to be inferred from Article 45, Paragraph 1, No. 2, in conjunction with Article 47, and has been more specifically stated in the General Report of the Drafting Committee of the London Conference, in the first paragraph of the Commentary on Section 45; here the general report states that the entire Conference had, both on legal and on practical grounds, been unanimous in the opinion that only persons in active military service, not however persons who, as for instance men of the reserve class, wish to return home in order to discharge their military service duty, are liable to be taken prisoners on a neutral vessel. Although the British Order in Council has adopted both articles as well as the comments of the General Report as binding on the Government, the British Naval units have carried off German citizens, subject to military ser-

vice, but not yet enlisted in the army, from merchant vessels flying the Dutch, Norwegian and Italian flags, and made them prisoners of war. They have thus grossly violated not only the principles of International Law as incorporated in the London Declaration but also their own rules of public law.

"According to a Decree of the President of the French Republic, published in the 'Journal Official' of August 26, 1914, France has taken up the same attitude as Great Britain in her Order in Council. Also French naval units have in the same manner as the British taken German citizens subject to military service from neutral ships, in particular from Dutch and Spanish ships.

"Thus the Ordinances and to a still greater extent the activities of the naval forces of Great Britain and France are violating the rules laid down by the London Declaration on the Law of Naval Warfare in the most arbitrary manner. Their aim is avowedly, by blocking neutral trade, to hit not only the armed forces but also the economic life of their opponent, and to this end they interfere in an unlawful manner both with the legitimate trade of neutrals with the enemy, as also with the trade of neutrals with each other. It is true that the London Declaration has not yet been ratified; the plenipotentiaries of the signatory powers, including the representatives of Great Britain and France, have however expressly stated in the introductory provision that the rules of the London Declaration are substantially in accordance with the generally recognized principles of International Law. The violations of the London Declaration, which Great Britatin and France have chosen to commit, are therefore at the same time violations of the Law of Nations, which appear in a more serious light, as Great Britain during wars in which she was a neutral, as, for instance, during the Russian-Japanese War, herself protested most energetically against such contraventions of the Law. (See English Blue Book, Russia No. 1, 1905 Correspondence respecting Contraband of War, p. 8ff.)

"The Imperial German Government has heretofore strictly observed the rules of the London Declaration and has adopted the same in the German Prize Ordinance of September 30, 1909 (Imperial Law Gazette, 1914, p. 275); in this attitude they have not let themselves be influenced even by the flagrant violations of

the law on the part of their opponents. They must, however, seriously take counsel with themselves, whether it is possible further to maintain this attitude if the enemy powers continue in the course of action they have adopted, and the neutral powers submit to such breaches of neutrality to the detriment of German interests. It would, therefore, be of value to the German Government to be informed of the standpoint the neutral powers contemplate taking in the face of the unlawful attitude of Great Britain and France, and in particular to learn whether they intend to take action against the violence committed on board their ships to German citizens and to German property."

6.

Order in Council of October 29th, 1914.

Order in Council of October 29, 1914.

This note of the German Government, however, did not have any effect. On the contrary, the new Order in Council which had been announced to the Dutch Government and which was published on October 29, 1914, showed that the British Government did not intend to deviate from the course once adopted.

This Order in Council repealed the Order in Council of August 20, 1914, and replaced the provisions of that Order by new rules, the most important of which are as follows:

1. The presumption of enemy destination will apply, apart from the cases provided for by the London Declaration, in the case of goods which are consigned to or for an agent of the enemy State.

2. Conditional contraband on ships which are bound for a neutral port is liable to capture, if consigned "to order," or if the ships' papers do not reveal the consignee, or show a consignee residing in territory belonging to or occupied by the enemy.

3. In the foregoing cases, in which the presumption of enemy destination may be raised, the *owners of the goods* have to prove their innocent destination.

4. The British Government reserves the right to abrogate Article 35 of the London Declaration in re-

spect of such neutral States, from or through territory of which the enemy government obtains supplies for its armed forces.

5. Otherwise the provisions of the London Declaration are to apply. The provision of the Order in Council of August 20, 1914, however, stating that also the General Report on the London Declaration is to be adopted, was not repeated in the new Order.

6. The list of articles of absolute contraband was increased from 12 to 26, and the list of articles of conditional contraband increased from 13 to 15 items.

Criticism of the Provisions of the Order in Council of October 29, 1914.

Apart from the fact that the General Report of the London Declaration was no longer recognized as binding, the basis of the new rules was the same as that of the Order in Council of August 20, 1914. In particular, the application of the principle of continuous voyage was fully upheld, all conditional contraband being liable to capture if the ship's papers showed that they were destined for an enemy country through a neutral country. This provision is thus identical with the rule of the Order in Council of August 20, 1914, according to which conditional contraband was subject to the same treatment if it was consigned to or for a person under the control of enemy authorities. A stricter application of the same was even introduced in that goods destined, according to the shipping documents, for a neutral country, were in spite of this circumstance presumed to have an enemy destination if they were consigned "to order," or if the shipping papers did not state the consignee.

In all these cases the owner of the goods, who did not want to lose same, was burdened with the duty of proving that the goods, in spite of the presumption of enemy destination lying against them, in reality had an innocent destination. Apart from the fact that this had actually already been the practice since the outbreak of the war, as shown by the report of the Dutch Government cited above, such a provision is directly opposed to the princi-

ples of International Law. For, according to the same, the captor has to prove enemy destination, and not the owner of the goods innocent destination.

There are, it is true, some few cases, also recognized by the London Declaration, in which the captor can avail himself of rules of evidence, which lighten his burden of proof. But these are of such a nature that, if they apply, the circumstances show almost to a certainty that the goods in question have enemy destination in the true sense of this term. Such circumstances, however, do not obtain when a shipment destined for a neutral country is, according to general trade usage, consigned "to order," or when a private party in enemy country is the consignee of the shipment.[6] If, in such cases, the presumption of enemy destination is set up, it does not rest upon any degree of probability of actual enemy destination, but merely on arbitrary discretion; a discretion which was in this case all the more arbitrary as the grounds alleged therefor in the Order in Council of August 20, 1914, namely, that the German foodstuffs supply was under Government control, were not repeated—which could not well have been done, as no such Government control existed at the time. Furthermore, the owner on whom the burden of proof of innocent destination is placed, is seldom able to furnish such proof to the satisfaction of the belligerent, as shown clearly by the aforementioned report of the Dutch Government. In any case, such regulation of the burden of proof is bound to lead to detentions of long duration and to severe losses for neutral parties. As to the enemy owner, no proof can be furnished by him at all, because he is not allowed to appear before British Prize Courts.

The consequence was that under the Order in Council of October 29, 1914, the same regulations applied to the shipment of articles of conditional contraband intended

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[6] See Note No. 5.

for the consumption of the German civil population, including foodstuffs, as under the Order in Council of August 20, 1914, *i. e.,* importation was rendered practically impossible.

Such a situation was, however, in the strictest sense conceivable opposed to the principles of International Law, and in particular to the principles which had always been upheld on this point by the English and by the American Governments, above all in the question of shipment of foodstuffs.

The attitude of Great Britain in this matter is shown by the following quotation from Moore, International Law Digest, Volume VII, page 682:

> "Lord Granville, British foreign secretary, however, in a note to M. Waddington, of February 27, 1885, declared that the British Government could not admit that provisions could be treated as contraband of war merely because they were consigned to a belligerent port. The British Government, said his Lordship, did not deny that provisions might acquire a contraband character, under particular circumstances, *as if they should be consigned directly to the fleet of a belligerent* or to a port where such fleet was lying, *but that there must, in any event, be circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of this kind are intended for the ordinary use of life,* and to show *prima facie,* at all events that they are destined for military use, before they could be treated as contraband."

And furthermore: Moore, International Law Digest, Volume VII, page 685:

> "In the course of the correspondence, Lord Salisbury thus defined the position of Her Majesty's Government on the question of contraband:
>
> " 'Foodstuffs, with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces. *It is not sufficient that they are capable of being so used.* It must be shown that this was in fact their destination at the time of the seizure.' "

The attitude of the British Government on this point was likewise shared by the Government of the United States. As proof of this fact reference is made to the instructions which the Secretary of State of the United States of America, Mr. Hay, gave to the American Ambassador in St. Petersburg in connection with a judgment rendered by the Prize Court of Vladivostok on August 30, 1904 (Moore, International Law Digest, Volume VII, page 691):

> "When war exists between powerful States, it is vital to the legitimate maritime commerce of neutral states, that there be no relaxation of the rule, no deviation from the criterion for determining what constitutes contraband of war, lawfully subject to belligerent capture, namely: Warlike nature, use and destination. Articles which, like coal, cotton and provisions, though ordinarily innocent, are capable of warlike use, are not subject to capture and confiscation unless shown by evidence to be actually destined for the military or naval forces of a belligerent.
>
> "*The substantive principle of Law of Nations cannot be overridden by technical rules of the Prize Court that the owners of the captured cargo must prove that no part of it may eventually come to the hands of the enemy forces. The proof is of an impossible nature;* and it cannot be admitted that the absence of proof in its nature impossible to make, can justify the seizure and condemnation. If it were otherwise all neutral commerce with the people of a belligerent State would be impossible, the innocent would suffer inevitable condemnation with the guilty. * * *
>
> "If the principle * * * is acquiesced in, it means, if carried into full execution, the complete destruction of all neutral commerce with the non-combatant population of Japan; *it obviates the necessity of blockades; it renders meaningless the principle of the Declaration of Paris* * * * that a blockade in *order to be obligatory must be effective; it obliterates all distinction between commerce in contraband and non-contraband goods and is in effect a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State.*"

And at an earlier date, in the year 1885, when France declared rice to be contraband, the American Ambassador at Berlin, in a letter of April 28, 1885, addressed to the American Secretary of State, wrote as follows:

> "I beg your attention to the importance of the principle involved in this declaration, as it concerns our American interests. We are neutrals in European wars. Food constitutes an immense portion of our exports. Every European war produces an increased demand for these supplies from neutral countries. *The French doctrine declares them contraband, not only when destined directly for military consumption, but when going in the ordinary course of trade as food for the civil population of the belligerent Government.* If food can be thus excluded, still more can clothing, the instruments of industry, and all less vital supplies be cut off, on the ground that they tend to support the efforts of the belligerent nation. Indeed, the real principle involved goes to this extent, that everything, the want of which will increase the distress of the civil population of the belligerent country may be declared contraband of war.
>
> "*The entire trade of neutrals with belligerents may thus be destroyed, irrespective of an effective blockade of ports.* War itself would become more fatal to neutral states than to belligerent interests.
>
> "*The rule of feudal times, the starvation of beleaguered and fortified towns, might be extended to an entire population of an open country. It is return to barbaric habits of war.*"[7]

The principles proclaimed in these statements of British and American statesmen are not merely in accordance

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[7] See also: Manual of British Prize Law, 1888. "The presumption * * * that provisions are contraband arises, when such hostile destination is either the enemy's fleet at sea, or a hostile port used exclusively or mainly for naval or military equipment."

The United States General Orders of 1898 declare to be conditional contraband: "provisions when destined for an enemy's ship or ships or for a place, that is besieged."

The United States War Code of 1900 in Art. 24 states that articles of conditional contraband may only be seized: "when actually and especially destined for the military or naval forces of the enemy."

with International Law of the past[8]. They also represent the rules of the Law of Nations of modern times, as unanimously upheld by all governments at the Conference of The Hague, and at the London Conference. The provisions of the Order in Council were a step backwards; they were a return to the inhuman warfare of former times, long since past. They set aside at a single stroke all the modern developments of International Law, inspired by principles of humanity, which aimed at limiting the effects of war to the fighting forces, and sought to protect the innocent civil population of the belligerent States from the sufferings of war. In later notes the British Government attempted to justify the step thus taken by alleging that with respect to the imports of a country in which, as in Germany, there was no difference between the armed forces and the civil population, no discrimination could be made between imports intended for the armed forces and those intended for the civil population, particularly in point of foodstuffs. To characterize such attempt is superfluous, if it is borne in mind that at the time of the enactment of the Order in Council, but a small fraction of the population of Germany was under arms, and that besides the German population available for the

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[8] (a) Particularly instructive are the following sentences taken from the Report of the Royal Commission on Supply of Food and Raw Material in Time of War, Volume 1, page 26, of the year 1905:

"The interest of neutral nations in the maintenance of International Law (*especially if the Nation interested is strong enough to enforce its views*) affords a further, and increasingly potent, guarantee of its being duly observed. It is, for instance, hardly to be expected that a neutral nation, if able to resent it, would tolerate the seizure, as contraband, of goods which had previously been recognized by International Law as innocent. It should be remembered also that the nation which we should have the greatest reason to hope would be neutral, were Great Britain engaged in war, the *United States of America*, is also that which, in such a case, would be most interested in maintaining those *neutral rights of which it has ever been the foremost advocate*."

(b) Of special interest are further the instructions of the British Government of July 12, 1907, to their delegates to the Hague Conference, which under No. 28, run as follows:

"It is essential to the *interest of Great Britain* that every effective measure necessary *to protect the importation of food supplies and raw materials for peaceful industries* should be accompanied *by all the sanctions which the Law of Nations can supply.*"

army, there were infant children, women, invalids and the aged.

Moreover, it was known at the time of the London Conference that universal military service existed, not only in Germany, but in practically all European States. In spite of this, the British Government signed the London Declaration, which upheld and clearly set forth in its provisions the distinction between civil population and armed forces! Such allegation can, therefore, no more be adduced to justify the action of the British Government against foodstuff importations intended for the German civil population than can the reasons stated in the Order in Council of August 20, 1914, in direct opposition to the actual facts, that the German foodstuffs supply was under Government control. A justification of the attempt made by Great Britain from the very first days of the war to starve the German population can thus neither be derived from actual facts nor from principles of International Law. This attempt was and remained a violation of the Law of Nations, and, therefore, an infringement upon the principles of humanity.

The provisions of the Order in Council did not, however, confine themselves to preventing the import of contraband into Germany; they applied the same principle to imports intended for the neutral countries themselves. This was effected by the rule stated above under No. 4. Although this provision, according to its wording, merely states that Section 35 of the London Declaration may, in certain cases, be disregarded, the principle of that article —prohibition of the application of the principle of continuous voyage, probatory force of the ship's documents —had, as a matter of fact, already been rendered void by the other provisions of the Order in Council. This provision could, therefore, have but one object, namely, that of providing a means to enforce the presumption of enemy destination against *all* shipments of conditional contraband to neutral countries. Under such circumstances any neutral country permitting, or even refraining from stopping, importations of any kind (not only importa-

tions of contraband) to the enemy's armed forces from its territory or through its territory, exposed itself to the danger of being placed on the same level as the enemy country.[9]

The consequence is clear. The neutral State was to be compelled to regulate its export and transit trade in such a manner as to suit the interests of British warfare.[10] This measure was thus in effect nothing else than a direct attack upon the sovereignty of neutral States. That such a step is absolutely opposed to the Law of Nations goes without saying.

There remains for consideration the extension of the contraband list enacted by the Order in Council. This extension referred to the list of absolute contraband, in which were included articles enumerated in the free list of the London Declaration, such as iron, ores, aluminum, nickel, copper, rubber, sulphuric acid.

It is a long established rule that only such articles are absolute contraband which are *exclusively* used for warfare.[11] Besides, the general report of the London Declaration, commenting upon the list drawn up at the Conference, expressly states that it would be difficult to mention "articles which are solely used for war purposes that

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[9] Such was also the viewpoint taken in neutral States. See, for instance, the "Nieuwe Rotterdamsche Courant" of November 9, 1914, where it is pointed out that even if a single box of cigars—which are not contraband—were sent from Holland to a member of the German army, this would suffice to place Holland and her colonies on the same level as the enemy country in respect of oversea trade.

[10] American papers at that time reported that England had demanded that America give up trading with Germany entirely. As compensation the suspension of the orders prohibiting export of rubber, hides, manganese and wool from England and her colonies was promised. This news was published under the suggestive heading: "England suggests that United States aid in starving Germany." See New York Sun, Dec. 1, 1914.

[11] See also the instructions of the British Government to their delegates to the London Conference which under No. 13 run as follows: "It may be doubted whether a rule, known to be favored by some of the Powers, under which additions to an established list of absolute contraband would be either prohibited altogether or allowed only conditionally on notice previously given, could be brought within the purview of the Declaration. It appears to be generally agreed that no such addition ought in any case to be admissible, except in the case of articles which cannot be utilized for other than warlike purposes."

have not been included in the list." That, however, the articles declared to be absolute contraband in extension of the list of the London Declaration, are not such as are used exclusively for war purposes, is shown from the fact that, for instance, rubber finds extensive employment for medical purposes! How little such procedure is in conformity with the principles which the English Government themselves regarded as International Law up till 1904, is shown by the following excerpt from a note of protest addressed by Lord Lansdowne against the Russian Government's declaration of rice and other foodstuffs as contraband:

> "His Majesty's Government desire to point out that the decision of the Prize Court of the captor in such matters, in order to be binding on neutral states, must be in accordance with recognized rules and principles of international law. His Majesty's Government feel themselves bound to reserve their rights by *protesting against the doctrine that it is for the belligerent to decide that certain articles, or classes of articles, are, as a matter of course,* and without reference to the considerations referred to in the earlier portion of this despatch, *to be dealt with as contraband of war, regardless of the well established rights of neutrals;* and His Majesty's Government could not consider themselves bound to recognize as valid the decision of any Prize Court which violated these rights, or was otherwise not in conformity with the recognized principles of international law."

In connection with the British Order in Council, it is further interesting to recall the speech of Lord Lansdowne on August 12, 1904, in which he characterized the attempt of the Russian Government referred to above to declare foodstuffs, cotton and fuel absolute contraband, as "regardless of the well established rights of neutrals."

Attitude of neutral governments with respect to the Order in Council of October 29.

It is obvious that the neutral States could not submit without protest to rules such as those enacted by the Order in Council. Thus a renewed protest of the Dutch Government is to be found in the "Recueil" cited above. This protest was directed not only against the establish-

ment of new cases in which a presumption of enemy destination arises, but also and in particular against the provision that a ship with conditional contraband on board was to be exposed to capture without any further investigation if bound for a neutral country from which or through which the enemy government was drawing supplies.

Besides this Dutch protest, a joint protest of the three Scandinavian neutral States is to be noted, in which the British contraband policy and the practice of British naval warfare was criticised in the following terms:

> "La liberté des mers et le droit imprescriptible des neutres de se servir des voies communes à tous ont été amoindris et circonscrits aussi par la prétention d'imposer aux navires neutres les obligations de suivre certaines routes et de faire escale dans certains ports, sans même que les neutres n'aient donné juste cause de soupçons qui pourraient motiver, voire justifier, ces restrictions.
>
> "Les notions de contrebande, tant absolue que relative, ont été dénaturées et démesurément étendues, ce qui constitue autant d'empiètements sur les droits des neutres.
>
> "En voulant appliquer à la contrebande conditionelle la théorie du voyage continu et certaines présomptions défavorables aux neutres on prétend assimiler, en réalité, cette contrebande à la contrebande absolue, ce qui constituerait une innovation des plus dangereuses.
>
> "Quant à la visite et la capture, les règles reconnues universellement depuis des siècles ne sont plus observées, ce qui cause au commerce légitime des retards qui entrainent des pertes considérables.
>
> "Dans les mesures indiquées, et dans d'autres encore, on retrouve la tendance d'exercer sur le commerce des pays neutres un contrôle qui est incompatible avec les droits, et même avec les devoirs, des neutres."

7.

Enforcement of the Order in Council of October 29, 1914.

Interference by the British Government with the trade of neutral States.

Apparently in connection with the enforcement of the aforementioned provision of the Order in Council of October 29, 1914, under which a neutral country may, in certain cases, be placed on a level with the enemy, the British Government approached neutral governments with the request that they should regulate their export and transit trade policy in accordance with certain British requirements. Thus, following the report of the Dutch "Recueil" repeatedly cited above, the British Minister in Holland demanded of the Netherland Government the prohibition of export for all articles enumerated in the English lists of absolute and conditional contraband. Furthermore, however, special guarantees were requested as to the final disposal of certain specific contraband articles. The Dutch Government refused to comply with such request on the grounds that by so doing they would be committing a breach of neutrality.

The same request was made to the other neutral Governments in Europe. This is to be inferred not only from the enactment of export embargoes by such governments after October 29th, but has also been expressly confirmed in the note of the Government of the United States of December 28, 1914, in which reference is made to guarantees offered by the governments of Norway, Sweden and Denmark as to non-exportation of contraband goods, with which the British Government had declared their satisfaction. Even the United States seems to have been approached with the same request, as may be gathered from American press reports mentioned above.

Methods of British Sea Warfare.

In spite of these guarantees given by the neutral States as to the non-exportation and transit traffic of contraband, the practice of British Naval Warfare remained unaltered. The Dutch Government in discussing this period in their "Recueil" state that they lodged a protest against the Order in Council, in particular against the provision

under which the British Government reserved the right to seize ships with conditional contraband bound for neutral States without further investigation, wherever it was ascertained that the enemy obtained supplies from or through such neutral countries. The British Government had thereupon offered to permit the import of foodstuffs, but only such foodstuffs as were *not* to be considered as *indispensable* for the nourishment of the population and furthermore only in *such* cases, when they were consigned to definite persons *and* it was conclusively proven that such persons were not agents for an enemy government. The report of the Recueil closes with the following words:

> "Apart from this slight concession, the situation remained the same under the new Order in Council as it had been under the Order in Council of August 22, 1914. Only upon the organization of the N. O. T. (Netherland Overseas Trust) and its recognition by the Allies did the situation improve."

The Government of the Netherlands in their "Recueil" also give information on the contraband policy pursued by the British Government. According to same the British Naval Units also seized goods that at the time of their shipment were not yet included in the contraband list. Under Article 43 of the London Declaration which had not been modified by the British Orders in Council, seizure in such cases cannot be effected unless against compensation. Such compensation, however, had been refused by the British Government, and protracted negotiations had, according to the Recueil, been necessary, in order to obtain indemnity from the British Government for the seizure of such articles.

But not only toward Dutch import trade did the British policy remain unaltered; it also underwent no change with respect to the other European countries and in spite of the guarantees that the Governments of such countries had given. This is shown by the following passage taken from the note of the United States of December 26, 1914, which at the same time confirms the information given in

the Dutch "Recueil" as to the British practice before the Order in Council of October 29, 1914:

> "During the early days of the war this Government assumed that the policy adopted by the British Government was due to the unexpected outbreak of hostilities and the necessity of immediate action to prevent contraband goods from reaching the enemy.[12] For this reason it was not disposed to judge this policy harshly or protest against it vigorously, although it was manifestly very injurious to American trade with the neutral countries of Europe. This Government, relying confidently upon the high regard which Great Britain has so often exhibited in the past for the rights of other nations, confidently awaited amendment of a course of action which denied to neutral commerce the freedom to which it was entitled by the Law of Nations.
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> "This expectation seemed to be rendered the more assured by the statement of the Foreign Office early in November that the British Government were satisfied with guarantees offered by the Norwegian, Swedish and Danish Governments as to the non-exportation of contraband goods when consigned to *named* persons in the territories of those governments, and that orders had been given to the British Fleet and customs authorities to restrict interference with neutral vessels carrying such cargoes so consigned to neutrals after verification of ship's papers and cargoes.
>
> *"It is therefore a matter of deep regret that, though nearly five months have passed since the war began, the British Government have not materially changed their policy and do not treat less injuriously ships and cargoes passing between neutral ports."*

This note, however, as is expressly stated therein, protested only against the treatment to which contraband shipments under way to neutral countries were submitted by the British Government. A protest against the inter-

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[12] Compare the "Times," January 29, 1919:

"THE DOVER PATROL."

"The story of the Dover Patrol begins with the passing through the Straits in *the last night of July, 1914* (*i. e.*, shortly after the general Russian mobilization and *before* the German *and* French mobilization!—), of the Grand Fleet on passage from Portland to its war station at Scapa. *From that date onwards* the Patrol's duty of maintaining a vigilant watch and guard grew in importance and increased in danger."

ception of direct trade with Germany is thus excluded. Furthermore, the note does not protest against the extension of the contraband list,[13] although such extension seems, as is stated in the note, open to objection. But in spite of all such moderation, it could not refrain drawing the following conclusion:

> 1. The treatment of absolute contraband is arbitrary. Such contraband is detained on the ground that the neutral countries to which it is destined have not prohibited the exportation of such articles. It is even detained in cases where such exportation *is* prohibited. The seizures are so numerous and the detentions so long, that exporters no longer risk to export, that shipping companies decline to accept cargoes and insurers refuse to issue policies.
>
> 2. In a like manner the treatment of conditional contraband is inconsistent with the principles of International Law. In spite of the presumption of innocent destination and use, without any proofs justifying the suspicion of enemy destination being in the hands of the British Government, and merely on the basis of vague suspicion—as, for instance, because the British Government *believed* that the cargoes *may possibly* at a later date find their way to enemy territory—*foodstuffs are seized, and this even when there is no ground for such suspicion in view of the export embargo existing in the country of destination. The situation is such that manufacturers and exporters, shipping and insurance companies, are faced with the danger of a gradual annihilation of their transatlantic trade.*

Although thus referring to the numerous cases of serious interference with neutral shipping, the note does not give information as to the full extent of such interference. Thus, for instance, from the very first days of the war, the British naval forces had made it a practice not only to search the ships that were met with on the high seas,

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[13] A protest of the United States against the extension of the contraband list was, in fact, never raised, although the illegitimacy of such extension was not only pointed out in this note, but a formal protest was expressly announced in the note addressed to the British Government on November 5, 1915.

but to bring same to an English port for examination. There the ships were detained for weeks and even months. These delays were due less to the search itself, than to the purpose of compelling the shipowners, through the losses arising from such delays, to voluntarily cause their ships on each voyage to call at an English port in order to be controlled there; this is shown by the "White Paper" of the British Government, published on January 5, 1916. That such procedure caused the shipowners so affected to submit with respect to all shipments to the terms set up by the British Government as to shipments is a matter of course.

With reference to shipments to Holland, the provisions of the Order in Council did not apply at all any more; they had been replaced by the terms of the N. O. T. organized under British compulsion. This organization, which was intended to provide for the replenishment of food supplies in Holland—it will be remembered that according to the report of the Dutch Government in their "Recueil," a scarcity of food had been brought about in that country by the British naval practice—could fulfil its object only by giving the double warranty that no goods imported and likewise no goods covered by an export embargo, would be exported to Germany or would reach Germany by way of transit. Goods which were not consigned to the N. O. T. were, without any further investigation, subjected to the presumption of enemy destination, as is shown by the "White Paper" of January 5, 1916, cited above.

Even neutral ships which were exclusively laden with non-contraband goods were brought into English ports, on the grounds that contraband might be concealed among the cargo.[14] Goods which had been discharged for the purpose of the search were frequently detained even after their innocent destination had been proved, and were requisitioned or their release was refused on the grounds

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[14] See British Notes to the Government of the United States of January 7th and February 10th, 1915.

that the exportation of such goods was prohibited by English law. Such course was also followed with reference to goods that were clearly non-contraband.

The effect of such practices also upon the trade in goods not falling under the rules of contraband is best shown by the case of cotton shipments from North America.

Such shipments were during the first months of the war practically stopped. The reason for this was that in the United States the rumor was persistently circulated that cotton would be treated as contraband by the British naval forces, or that the declaration of cotton as contraband was impending. It was not until October 26, 1914, that the American Department of State was in a position to publish a communication of the British Ambassador stating that such rumors were without foundation. France made a similar declaration, but not before December 17th. In the meantime, however, export and transit embargoes had been enacted both in Holland and in Denmark. In spite of this, neutral ships which were met on the high seas with cotton cargoes destined to neutral States were brought into port. This continued to be the practice even after the British Consular officers at the different American ports had organized a strict search, by means of X-rays, of each bale shipped. Nothing better characterizes the consequence of these practices than the situation which developed on the American cotton market and which led to the "buy a bale of cotton movement," where everyone was called upon to purchase a bale of cotton for $50 in order to alleviate the distress in the Southern States.

Reference must also be made to the manner in which the British Government exploited their monopolistic control over certain kinds of raw materials. Thus, for instance, by prohibiting the exportation of rubber and wool to neutral countries, they brought about such scarcity of these materials, that the neutral countries affected were compelled to submit to all requirements of the British Government, if they wanted further to obtain such materials. Such control was first established on the rubber

market of the United States. There the "Rubber Club of America" was in the conditions published designated as sole agency from which rubber could be bought. Anyone wishing to buy rubber from this organization had to undertake not to ship rubber or rubber products to other countries, unless such shipments went via England; furthermore, he might sell no rubber or rubber products to persons residing in the United States of America, before it was assured that such persons would give the same undertaking. These conditions, which even were in conflict with the American Trust Laws,[15] were published in the United States as early as January 31, 1915.

Similar conditions had to be complied with by importers of wool and of various metals, such as tin, etc.

In summing up it may thus be said that the enforcement of the Order in Council of October 29, 1914, and the activities of British Naval Units were bound to lead to the consequence that all importation to Germany from overseas was stopped whether direct or indirect through neutral countries.

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[15] Section 73 of the Law of February 12, 1913, provides that any agreement is unlawful and null and void:

"When the same is made by or between two or more persons or corporations either of whom as agent or principal is engaged in importing any article from any foreign country into the United States, and where such combination, conspiracy, trust, agreement or contract is intended to operate in restraint of lawful trade or free competition in a lawful trade or commerce."

The Sherman Act of July 2, 1890, provides:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States * * * or with foreign nations is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments in the discretion of the Court."

8.

English Mine Warfare in the North Sea and English War Zone Declaration of November 2, 1914.

Interferences of the kind described above were not the only ones to which neutral trade had to submit, for in the course of the first months of the war the free passage of neutral trade over a large portion of the high seas was barred.

On October 2, 1914, the British Admiralty published a warning to the effect that it had become necessary to lay a large mine field at the entrance to the English Channel from the North Sea. This measure was justified by the mine policy alleged to have been adopted by Germany and the activities of German submarines.

The grounds alleged were only in part borne out by actual facts. It is true that the activity of German submarines had inflicted serious losses upon the British navy by the sinking of the cruisers "Hogue," "Aboukir" and "Cressy" on September 22, 1914. This, however, was a legitimate operation of war and could not therefore be taken by the British Government as a reason for relinquishing the stand they had so pronouncedly maintained before the War, that the planting of mines on the high seas was inconsistent with the principles of International Law.

No justification can, however, be given for the criticism applied to the alleged mine policy of the German Government. The falsity of this assertion will be shown at a later occasion. For the present it may suffice to point out that the German policy of laying mines was in accordance with the principles established by the Hague Convention on the laying of submarine contact mines. Here, also, therefore, the British Government could not take the course adopted by Germany as a reason to commence laying mines on the high seas, in spite of the attitude they had previously taken on this point.

It must therefore be assumed that the true reason for the laying of British mine fields on the high seas was of a different nature.

The mine field extended over 1,365 square sea miles. It had been so designed that it almost completely barred the entrance to the Channel from the North sea. Only a narrow passage along the English coast remained open, the navigation of which strip, however, was on account of the depth of the water only possible within English territorial limits.

From the strategic design of this mine field, it is thus to be inferred with surprising lucidity why the field was planted and what object was to be attained thereby. Although the provisions of the Order in Council afforded the legal justification to search neutral ships on the high seas and to detain same on suspicion of contraband, there still remained the possibility that such ships might reach their neutral destination, without being met by the English Naval Units. To reduce such a chance was apparently the purpose of the mine field, for now all neutral vessels bound for Holland or for the Scandinavian countries by way of the English Channel were at a certain point compelled to approach so near to the English coast that they could no longer escape the British Naval Forces posted there to control them. In this manner all neutral shipping passing through the English Channel—and this was by far the major portion of neutral shipping—was, at a single stroke, and without any chance of escape, delivered up to British control. The only way to escape such control was around the North of the British Isles. But this passage also was soon barred, and ships sailing to or from Scandinavian countries and Holland were compelled to take a prescribed route leading through the English Channel, along the English Coast and thence for ships bound to Scandinavian ports across the North Sea by a single exactly defined course.

British War Zone Declaration of November 2, 1914.

This blockade took effect on November 2, 1914.

At the date mentioned the British Government declared the entire North Sea to be a war zone. All ships, it was stated in the declaration, attempting to cross such War Zone along any other course than that prescribed by the British Admiralty would do this at their own risk, and

would be exposed to the gravest dangers from the mines planted in the zone and from the naval units which would keep up a watchful vigil for any suspicious craft which might enter the zone.

From this time onward all trade with German ports through the North Sea was inhibited through the serious danger menacing any craft which might try to engage therein. Now, all neutral ships were forced, if they wished to escape the danger to life threatening their crews, to steer a course which absolutely prevented any such ships from escaping the control of the British Naval Forces.

The result was that from then onward the provisions of the British Order in Council of October 29, 1914, could be enforced to their full extent and without the possibility of even a single fortuitous exception. And just as the neutral shipping in the North Sea was thus submitted to absolute control, so, also, ship traffic in the Mediterranean was subjected to the same control at Gibraltar.

9.

Results of the Allied Sea Warfare: Germany Blockaded with Respect to Importations.

Results of the British Blockade measures.

As a result of all these measures the following situation was brought about:

1. All direct or indirect imports to Germany from oversea countries were stopped. In particular, the importation of foodstuffs was rendered impossible by the fact that the distinction between absolute and conditional contraband had been abolished. Even the importation of non-contraband goods was prevented by compelling the vessels on which such goods were shipped to discharge same, on the grounds that contraband might be concealed in or amongst them, and by their either requisitioning the goods or detaining them, under the pretext of an export prohibition, and thereby forcing the owners to sell them.

2. In order to avoid being completely cut off from

oversea supplies, the neutral States had been compelled to submit to the British demands and to issue far-reaching orders prohibiting export. The British Government even went so far as to demand that the trade of such countries with Germany in non-contraband articles of their own production be stopped by threatening to treat these neutral countries as enemies.

3. Entire branches of industry in neutral countries, in particular in the United States of America, were compelled to sever all relations with Germany. Holland, besides this, was forced to call into life a special organization, which took the whole trade of the country under its control, and thereby under the control of Great Britain. Individuals and business firms failing to comply with the terms of this organization were excluded from oversea trade by the fact that all shipments to such individuals and firms were detained on the grounds of being suspected of enemy destination.

4. Free navigation of neutral merchant vessels on the North Sea was rendered impossible by the War Zone Declaration, as any vessel disregarding the provisions of this enactment was exposed to the danger of destruction. Every neutral ship was thus compelled to enter British territorial waters in order to submit to the British control, not only of her cargo, but also of the mail she might be carrying.

Germany as regards imports, already blockaded in November, 1914.

This summary of the situation shows that Germany was, as regards her import trade, from the beginning of November, 1914, in a condition of actual blockade. The measures taken by Great Britain and France—for the French Government always followed the example set by Great Britain—thus had the actual effect of a blockade, although no blockade had been declared. Such was also the idea and purpose of the British Government, one of whose Cabinet Ministers, Mr. Winston Churchill, in a speech delivered on November 9, 1914, at the London Guildhall, made express mention of an existing blockade of Germany in the following terms:

> "The British people have taken for themselves this motto: 'Business carried on as usual during alterations on the map of Europe.' They expect the Navy, on which they have lavished so much care and expense, to make that good, and that is what, upon the whole, we are actually achieving at the present time. It is very difficult to measure the full effects of naval pressure in the early stages of the war. The punishment we receive is clear and definite. The punishment we inflict is very often not seen, and even when seen cannot be measured. The economic stringency resulting *from a naval blockade* requires time, if it is to reach its full effectiveness. *We are only looking at it in the third month.* But wait a bit. Examine it in the sixth month, in the ninth month, in the twelfth month, and you will begin to see results, results, which will be gradually achieved, silently achieved, but which spell the doom of Germany as surely as the approach of winter strikes the leaves from the trees."

And a short time after this speech the British Prime Minister, Mr. Asquith, in an address delivered to the House of Commons on November 16, 1914, stated it to be one of the most important duties of the British Government "to withhold from the enemy supplies whether of food or of war-like materials, or other things of which he is urgently in need."

By means of an arbitrary extension of the definition of contraband, such as is unparalleled in the history of the Law of sea warfare, and by means of blocking an entire Sea, the British Government sought to bring about the complete stoppage of all import trade to Germany. In this manner they relieved themselves of the necessity of declaring a blockade, as such if carried through according to the rules of International Law would not have been possible, and thus in order to achieve their purpose of starving Germany's civil population, they returned to the stage of the so-called paper blockade, also termed by writers on International law as "blocus anglais," which had already been abolished by the Paris Declaration of 1856. For Germany and her population as far as Britain's power reached, there no longer existed any rights under the Law of Nations.

10.

Further Interferences with the Carriage of Passengers on Neutral Ships.

Action taken against German civilians on neutral ships in the period following the German Protest Note of October 10, 1914.

The same arbitrary procedure was adopted towards German civilians wherever they were met with on the high seas. In the first pages of this report, and in the above-mentioned German Memorandum of October 10, 1914, it was shown how the British and French Naval units, in entire disregard of the rules of the London Declaration and of the General Report, carried off German reservists from neutral ships. The German Memorandum was on this point also doomed to remain without any effect.

Probably on account of protests of neutral governments the British Naval Forces in October had received orders to permit German citizens up to a maximum of 50 persons on every neutral ship to pass unmolested. As soon, however, as this order became known to the British press a hue and cry was raised against it by a large portion of the leading papers. Thus the Morning Post declared that it was incomprehensible that the British Government should in this manner aid and abet the enemy: "The legal aspect of the matter did not interest the public in the slightest degree." In vain the Governmental "Westminster Gazette," tried to oppose this attitude. Those who were now attacking the Government so furiously, it wrote, forgot that what they were asking meant an intrusion on the rights of neutral powers, and that it had always been England's tradition to uphold the same freedom and rights of neutrals the violation of which is now desired.

> "If the British Government are compelled to observe certain limitations imposed by the dictates of the law and international courtesy, they do so not out of any consideration for the enemy, but merely in order to keep the English name untainted."

In spite of these declarations of their semi-official organ, the British Government on November 1, 1914, revoked

the order. German citizens, who had embarked upon sea-going vessels relying upon the order, were forcibly taken from neutral ships and made prisoners of war. Soon even a further step was taken, and German citizens, bound for foreign countries of whom it could therefore not even be contended that they had undertaken the voyage in order to enter the German army, were likewise made prisoners from neutral ships. Thus neither the principles of the Law of Nations, nor the rules enacted by the British Government in the form of a law, nor finally the assurance expressly given, afforded German citizens protection against being taken prisoners.

11.

German Naval Warfare up to February 4, 1915.

German naval Warfare up to February, 1915.

While thus the sea warfare carried on by Great Britain and France from the beginning of the war aimed by unlawful means at starving out the population of Germany, including women, children, invalids and the aged, the naval operations conducted by Germany during the first five months of the war, offered a materially different aspect.

The German Government until the end of January, 1915—a fact which deserves to be underlined—adhered to their Prize Ordinance published at the outbreak of the war, and thereby, to the London Declaration, with the exception of a few additions made to the list of conditional contraband. They did so, although they had in the memorandum of October 10, 1914, cited above, in which the open violations of the law of naval warfare committed by Great Britain were enumerated, notified to the neutral powers that they were compelled to raise the question whether Germany would further be able to adhere to its Prize Ordinance if the enemy powers persisted in the course of naval warfare they had adopted, and if the neutral powers further submitted to such breaches of neutrality, to the detriment of German interests.

But not only the orders issued to the German Naval

Forces conformed with the rules of International Law and the London Declaration; the practice of German commercial warfare was also in strict accordance with these principles. It is necessary to lay stress upon this fact, because not only did the British practice, as has been shown above, fail to comply either with the Orders in Council, or with the principles of International Law, but the British Government in their official publications repeatedly contended that the German Naval Forces had in the pursuance of trade warfare violated the principles of the Law of Nations.

In reality no such contention can rightfully be maintained. It is sufficient to recall the chivalrous attitude of German cruisers, in particular of the "Emden" and the "Karlsruhe." In waging war on enemy trade, they observed the greatest restraint. In many cases they permitted enemy merchant vessels to pass unmolested, as, for instance, if women and children were among the passengers. They even released enemy ships, where it was shown that they had no knowledge of the outbreak of hostilities, although Germany had entered a reservation to Section 3 of VI. Hague Convention of October 18, 1907, under which such vessels are declared free from capture. Nentral ships were interfered with only in a few exceptional cases. Thus up till February 1, 1915, they captured and sunk but two neutral vessels, namely, on September 21, 1914, the Dutch steamer "Maria," and on January 28, 1915, the American sailing ship "William P. Frye," whilst in all other cases neutral ships encountered were permitted to pass without restraint. By exploiting the case of the "Maria" and asserting that the German Government had through a public proclamation declared practically all ports of the East Coast of England to be fortified places or supply bases, the British Government sought to create the impression that Germany had by means of an unlawful extension of the definition of "fortified place" and "supply base" from the very beginning of the war tried to interfere with the provisioning of England. Apart from the fact that no such proclamation was ever issued

by the German Government, the German Naval Units were in reality ordered to treat only the following British ports as supply bases, besides places actually fortified and known as such: 1, London; 2, Southampton; 3, Barrow-in-Furness; 4, Glasgow; 5, Scapa Flow; 6, Cromarty; 7, Newcastle; 8, Yarrow; 9, Hull; 10, Crimsby; 11, Belfast. The steamer "Maria" was bound for the last named port, namely, for Belfast, whereas the sailing ship "William P. Frye" was bound to Queenstown, Falmouth or Plymouth for orders, all of which ports are undoubtedly fortified places within the meaning of the London Rules. The action of the Commanders of the cruisers was therefore in both cases entirely justified.

If, as a matter of fact, the list of English ports to be considered as supply bases was, in the second part of November, *i. e.*, subsequent to the British War Zone Declaration, subjected to a certain extension which, in view of the large number of British ports,[16] cannot be considered as immoderate, such action cannot be even remotely compared with the provision of the Order in Council of August 20, 1914, whereby all cargoes intended for German civilians were subjected to the presumption of enemy destination, irrespective of the port for which they were consigned. The fact, moreover, that Germany, from the very first days of the war, refrained completely from interfering with the export of foodstuffs from Denmark to Great Britain, which was of the highest importance to the latter country, and which would have been an easy matter for Germany to stop, but permitted same to continue to all British ports without discrimination, shows conclusively how remote it was from the inten-

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[16] Contrary hereto, the British Government treated all German ports as bases of operations and supplies. This is to be inferred from the following: In the proceedings before the Prize Court in the case of the "Kim" in August, 1915, the Judge asked the Solicitor-General, Sir Frederik K. Smith, whether in his opinion contraband could be seized if bound for a German port, which was neither a base of operations nor of supplies. The answer was: "There are no such ports; the case could not arise" (Lloyds Prize Cases, Vol. III, page 284).

tions of German naval operations to cut off the food supplies of the civilian population of Great Britain.

And just as such importation of foodstuffs was not interfered with, so also did the German Government likewise refrain from following the example of the allied governments in interfering with the export policy of neutral governments. It is unnecessary to point out that the German Naval Forces, following the rules of the London Declaration, also refrained from interfering with the mail and passengers on neutral ships.

But further serious accusations have been raised against the mode of German sea warfare in these first months of the war.

In the English press, and in particuluar in the grounds given for the English War Zone Declaration of November 2, 1914, it was asserted that Germany had thrown out mines broadcast on the high seas; that this had been done not only by war vessels, but also by hospital ships or by ships flying a neutral flag, and that it was a common device of German sea warfare to carry on espionage by means of hospital ships, fishing craft and neutral craft.

Such a contention is, however, as inconsistent with the actual facts as were the assertions on which the Orders in Council, enacted to cut off Germany from all food supplies, were founded. Up to November 2, 1914, only five mine barrages had been planted by Germany in proximity to the English coast. Two further barrages were laid near Helgoland for purposes of defense. All seven barrages consisted of anchored mines, which had been laid exclusively by German war vessels. The same applies to the mine field on the North Coast of Ireland, into which the British battleship "Audacious" subsequently ran and sank. This mine field was, though it was at the time not held to be possible by the British Admiralty, laid by a German warship, namely, by the auxiliary cruiser "Berlin." Floating mines were likewise not laid. The mine barrages on the English coast lay in immediate proximity to the coast, with the sole exception of the mines laid in the mouth of the Thames on August 5, 1914, by the

auxiliary war vessel "Konigin Luise." These mines, too, were anchored, and were located at a distance of not more than 30 miles from the English Coast, and this distance from the Coast was only due to the fact that the "Konigin Luise" was compelled to throw out these mines for her own defense against British war vessels which she encountered and tried to escape.

It is, therefore, an absolute impossibility that German mine barrages should have been found on the high seas.

If single German mines have actually been encountered on the high seas, it can only have been the case of mines which were torn away from their moorings; but also such probability is very remote, as the German mines were always anchored with the greatest care. This is also shown by the fact that, of 100 mines which had drifted onto the Dutch Coast by the end of November, 1914, all were semi-officially stated by the Dutch Government to be of British origin, and not a single one of German origin.

Just as little truth is contained in the assertion that German warfare took resort to neutral ships for purposes of espionage. This never occurred, either during the first period of the war or at any later date. And the British Admiralty has, therefore, not been able to prove a single such case. On the other hand, it must be inferred from the rewards publicly advertised that the British Admiralty, as a matter of fact, adopted such means.

Finally, the contention that German warfare resorted to the use of hospital ships for laying mines and for espionage purposes, is likewise not true. This assertion could only refer to the capture of the auxiliary hospital ship "Ophelia" by British Naval Forces on October 18, 1914, that vessel being the only German hospital ship that ever went beyond the bounds of the Bay of Heligoland.

The "Ophelia" was on her way to the scene of the encounter that had taken place between German torpedo boats and British Naval Forces on October 17, in which the torpedo boats had been sunk. In consequence of this hospital ship's being captured, the saving of many men from drowning was rendered impossible. These

lives could have been saved if the British naval authorities had, in accordance with Article 4 of the X. Hague Convention of October 18, 1907, concerning the application of the principles of the Geneva Convention to sea warfare, placed a Commissioner on board the ship and let her proceed to the rescue, instead of bringing her into a port.

The capture was justified by the British Admiralty as follows:

> "The German ship 'Ophelia,' which was flying the red cross flag, was detained *because her name had not been notified to the British Government, as a hospital ship,* and because the ship, when encountered, was acting in a manner incompatible with the duties of a hospital ship."

The first reason given for the capture was that the name of the ship had not been notified. As a matter of fact, however, the name had been communicated to the British Government on September 7, 1914, by the Government of the United States; at least the German Government was so informed by the American Government. It is true that the American Government at a later date declared that in consequence of an oversight the communication had not been passed on to the British Government. In view of the fact, however, that the appeal judgment rendered by the Privy Council expressly states that the name of the "Ophelia" was duly communicated to the belligerent powers, it is obvious that the first ground alleged by the British Government on November 4, 1914, for the capture was inconsistent with the actual facts.

The second reason stated, namely, the alleged unwarranted conduct at the time of capture, has remained entirely unproven before both Prize Courts. In order to secure the condemnation of the ship, however, divers circumstances and later occurrences were alleged as of a suspicious nature and the character of the "Ophelia" as a hospital ship was disputed. The German Government in an extensive memorandum issued after the judgment of

the Court of first instance refuted these allegations, but the Privy Council would not allow this memorandum to be produced in evidence. Only in such manner was the condemnation of the ship obtained.

Thus the grounds stated in justification of the War Zone Declaration of November 2, 1914, were, as can be proven, directly opposed to the actual facts. Furthermore, circumstances such as were alleged by the British Government and also in the British Press at that time, cannot have been known to the British authorities, because as a matter of fact such circumstances did not exist. If, nevertheless, they were stated as proven facts, the conclusion to be drawn is obvious.

It was probably felt that measures such as the War Zone Declaration and the planting of large mine fields on the high seas, at the entrance of the English Channel, could only be justified as retaliatory measures against alleged violations of International Law, on the part of German naval forces, and therefore such allegations were made. As a matter of fact, however, no such violations had been committed as is shown by the fact that whilst before the British War Zone Declaration numerous protests had been raised by neutral governments against British naval war measures, no such protest, or at least no material protest had been lodged with the German Government.

PERIOD FROM FEBRUARY 4, 1915, TO THE END OF APRIL, 1916.

1.

German War Zone Declaration of February 4, 1915.

Fight for existence of the German Empire.

All protests of neutral States, however, against the actions of the British Government were of no avail. Even the protest raised by the Government of the United States on December 26, 1914, was rejected on January 7, 1915. The firm determination of the British Government to continue the sea warfare policy pursued up to that time was thereby made clear.

The question now arose whether Germany, confronted by such a situation, could adhere to the methods thus far employed by her in her own warfare? Should she permit the trade barrier imposed by Great Britain to become more and more effective? If that took place, *i. e.*, if Germany was unable to break this barrier, her end was undoubtedly at hand. Germany was living on her own meagre supplies. Even in peace time the country was dependent upon the importation of foodstuffs from abroad. When these imports were stopped and Germany's granary in East Prussia had been devastated by the Russian invasion so that no supplies could be drawn from there, a single bad harvest could have the effect of bringing the whole food supply of Germany to a collapse and thus produce the most serious famine. Germany was, as the British Cabinet Minister, Mr. Winston Churchill, most cynically stated in an interview during the winter of 1914-15, in the position of a strong man into whose mouth a gag had been thrust, and who is compelled at the same time to perform the hardest labour. The issue thus put to Germany was either with her women and children to fall a prey to starvation in a very short time, just as previously had been the fate of the Boer nation, or to submit to the terms of her enemies. Germany was fighting for her existence, which was being threatened by means and devices contrary to the Law of Nations.

Under such circumstances no choice was left for Germany than to give up the methods of sea warfare heretofore pursued, and to adopt the same system as had been applied by Great Britain for the last five months. That meant that Germany had likewise to place a barrier around Great Britain and retaliate against the British war of starvation by the same measure. Therefore, the German Government on February 4, 1915, declared the waters around Great Britain to be a war zone.

2.

Justification of the German War Zone Declaration as Retaliatory Measure.

Justification of the German War Zone Declaration of February 4, 1915, as Retaliatory Measure.

In the circular note addressed to all neutral governments by which the German War Zone Declaration of February 4, 1915, was made public, that measure has been expressly stated to be of a retaliatory nature, called forth by the situation of distress which had been brought upon Germany through the illegal blockade measures applied by Great Britain and her Allies.

Retaliation[17] or reprisal is a means of compulsion applicable by one State against another, which through an illegal act has caused injury to the former and cannot be prevailed upon to desist from its unlawful practice. The illegality of the first act must be ascertained beyond doubt. The retaliatory measure is, however, not confined to the employment of the same means, as were adopted

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[17] See Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863:

"27. The Law of War can no more wholly dispense with retaliation than can the Law of Nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

"28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover cautiously and unavoidably—that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence and the character of the misdeeds that may demand retribution."

by the State against which retaliation is to be exercised, in committing the first wrong. On the other hand it is an essential condition precedent that such retaliatory measure be directed only against the party guilty of the first violation of law, and does not at the same time aim at hitting neutral States and their subjects. With these limitations retaliation is unquestionably acknowledged in International custom as a justified mode of action.

In warfare, however, a retaliatory measure will always be bound to interfere with the rights of Neutral States. But if this circumstance were to render the retaliatory measure unlawful, the State that has been the victim of a wrong, would be deprived of all possibility of warding off such illegal act. That, however, would be contrary to the interests of all other States adhering to the Community of International Law. Such other States must therefore submit to a sacrifice in the general interest. In so doing they may insist that no unnecessary damage to their individual interests be wrought.

Inasmuch and so far, however, as such individual interests are liable to prevent the attainment of the purpose aimed at by the retaliatory measure, they must stand aside.[18] In such case the neutral States can only demand

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[18] (a) See Note of the British Government of April 24, 1916:

"38. The more abstract question of the legitimacy of measures of retaliation adopted by one belligerent against his opponent, but affecting neutrals also, is one of which His Majesty's Government think the discussion might well be deferred. It is a subject of considerable difficulty and complexity, but His Majesty's Government are surprised to notice that the Government of the States seem to regard all such measures of retaliation in war as illegal, if they should incidentally inflict injury upon neutrals. The advantage which any such principle would give to the determined law-breaker would be so great that His Majesty's Government cannot conceive that it would commend itself to the conscience of mankind. To take a simple instance, suppose that one belligerent scatters mines on the trade routes so as to impede or destroy the commerce of his enemy—an action which is illegitimate and calculated to inflict injury upon neutrals as well as upon the other belligerents—what is that belligerent to do? Is he precluded from meeting in any way this lawless attack upon him by his enemy? His Majesty's Government cannot think that he is not entitled by way of retaliation to scatter mines in his turn, even though in so doing he also interferes with neutral rights. Or take an even more extreme case, suppose that a neutral failed to prevent his territory being made use of by one of the belligerents for warlike pur-

that sufficient opportunity be offered to them and to their subjects before the retaliatory measure is enforced, to make provisions for safeguarding their interests.

The German War Zone Declaration was in entire conformity with these requirements. It was directed solely against enemy ships and allowed to neutrals by means of a fourteen days' notice—only two days' notice had been given in the British War Zone Declaration—sufficient opportunity to make provision for safeguarding their interests on enemy ships. That this measure was justified as

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poses, could he object to the other belligerent acting in the same way? It would seem that the true view must be that each belligerent is entitled to insist on being allowed to meet his enemy on terms of equal liberty of action. If one of them is allowed to make an attack upon the other regardless of neutral rights, his opponent must be allowed similar latitude in prosecuting the struggle, nor should he in that case be limited to the adoption of measures precisely identical with those of his opponent."

(b) See also Times of December 17, 1918, Judgment of the Privy Council in the case of the "Stigstad":

"* * * If the statements on the 'Zamora' case be correct, the recitals in the Order in Council sufficiently establish the existence of such breaches of law on the part of the German Government as justify retaliatory measures on the part of His Majesty and, if so, the only question open to the neutral claimant for the purpose of invalidating the Order is whether it subjects neutrals to more inconvenience or prejudice than is reasonably necessary under the circumstances. * * * In considering whether more inconvenience is inflicted upon neutrals than the circumstances involve, the frequency and the enormity of the original wrongs are alike material, for the more gross and universal these wrongs are, the more are all nations concerned in their repression, and bound for their part to submit to such sacrifices as that repression involves. * * * Neutrals whose principles of policy lead them to refrain from punitory or repressive action of their own may well be called on to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas."

Exceptions must be taken to the assertion made in this decision that the neutral state is obliged to take active action against the law-breaker, and that if he fails to do so, he must suffer the infringement of his own rights caused by the retaliatory measure, as a penalty. Such opinion confuses the duties arising for a neutral out of the retaliatory measure of one belligerent against another, with the obligations incumbent upon neutral States by reason of neutrality. The first named duties are not affected by the attitude which the neutral State in question has taken against the first infringement of the Law where, however, a neutral state has failed to take action against an infringement of the Law of Nations which also affect its rights, the duty incumbent upon such State by reason of its neutrality, of maintaining a strictly impartial attitude obliges it to yield to *the retaliatory measure*, regardless as to how its rights are thereby affected; and it should here be noted that *the submission to a violation of the law* on the part of a neutral whose rights are thereby affected *can already be considered as a breach of neutrality by such neutral.*

an act of retaliation, because it was directed against a continuous violation of the law, can no more be put to question than the fact that such violation had seriously affected the rights of neutrals. For this very reason it would have been impossible to act by way of retaliation without in a similar manner affecting such rights of neutrals. At the same time, however, the grave situation must be considered which had arisen for Germany through the unlawful blockade of her import trade, a situation that was bound to grow more serious as the blockade continued. Although in principle a retaliatory measure must not necessarily be based upon a situation of compulsion, still the existence of such compulsion is liable to materially influence the act of retaliation. For compelling necessity and the right of self-preservation alone suffice to justify an infringement on neutral rights. If, however, such situation of compulsion has been brought about by acts contrary to the law of Nations, which at the same time infringe upon the rights of neutrals, or if by such acts the security and existence of a whole nation is put to stake, then the necessary defensive measures can be resorted to regardless of the possibility of neutral rights thereby being affected.[19]

Thus the German War Zone Declaration was fully justified as a retaliatory measure. It was moreover further justified in that it merely followed the example given by Great Britain on November 2, 1914, and as a matter of fact did not in any way differ from the British War Zone Declaration than in the words used.

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[19] See note of the Government of the United States to the British Government bearing date of December 26, 1914:

"The commerce between countries which are not belligerents should not be interfered with by those at war unless such interference is manifestly an imperative necessity to protect their national safety, and then only to the extent that it is a necessity. It is with no lack of appreciation of the momentous nature of the present struggle in which Great Britain is engaged and with no selfish desire to gain undue commercial advantage that this Government is reluctantly forced to the conclusion that the present policy of His Majesty's Government toward neutral ships and cargoes exceeds the manifest necessity of a belligerent and constitutes restrictions upon the rights of American citizens on the high seas which are not justified by the rules of International Law or required under the principle of self-preservation."

3.

Identity in Principle Between the British and the German War Zone Declarations.

Identity in principle between the British and the German War Zone Declarations.

The German Declaration[20] announced that enemy merchant ships encountered within the German War Zone would be destroyed; neutral merchant vessels were warned that they would expose themselves to dangers which were not intended for them, if they entered this War Zone.

Great Britain on the other hand had on November 2, 1914,[21] declared that the new conditions under which the

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[20] "1. The waters around Great Britain and Ireland, including the entire English Channel, are hereby declared to be a war area. Beginning with February 18, 1915, any enemy merchantmen encountered in this war area, will be destroyed, without it being always possible to avoid the dangers thereby arising for the crew and the passengers.

"2. Neutral ships are likewise exposed in this war area to danger, it being in view of the misuse of neutral flags enacted by the British Government on January 31st and of the chances of naval warfare, not always possible to avoid that attacks intended for enemy ships may also hit neutral vessels.

"3. Navigation north of the Shetland Islands in the Eastern section of the North Sea, and in a zone at least 30 miles along the Coast of Holland is not dangerous.

"Berlin, February 4, 1915."

[21] "During the last week the Germans have scattered mines indiscriminately in the open sea on the main trade route from America to Liverpool via the North of Ireland. Peaceful merchant ships have already been blown up with loss of life by this agency. The White Star Liner 'Olympic' escaped disaster by pure good luck. But for the warnings given by British cruisers, other British and neutral merchant and passenger vessels would have been destroyed. These mines cannot have been laid by any German ship of war. They have been laid by some merchant vessel flying a neutral flag which has come along the trade route as if for the purposes of peaceful commerce and, while profiting to the full by the immunity enjoyed by neutral merchant ships, has wantonly and recklessly endangered the lives of all who travel on the sea, regardless of whether they are friend or foe, civilian or military in character.

"Mine-laying under a neutral flag and reconnaissance conducted by trawlers, hospital ships, and neutral vessels are the ordinary features of German naval warfare. In these circumstances, having regard to the great interests entrusted to the British Navy, to the safety of peaceful commerce on the high seas, and to the maintenance, within the limits of International Law, of trade between neutral countries, the Admiralty feel it necessary to adopt exceptional measures appropriate to the novel conditions under which this war is being waged.

war was being waged necessitated the adoption of extraordinary measures. For this reason the entire North Sea was to be considered as a War Zone within which any merchant ship, including fishing craft, would be exposed to the gravest dangers. Such dangers would arise not only from mines but also from war ships. Every vessel crossing the Northern boundary of the War Zone after November 5th was to do so at her own risk and peril. Deviations even of a few miles from the course prescribed by the British Admiralty would entail "fatal consequences"! Such were the main contents of the British War Zone Declaration.

The dangers arising from mines are well known. It was, however, with the technical appliances available at that time, as a matter of fact not possible to plant mines in the Northern section of the North Sea area which had been declared a war zone. The most important question therefore arises, of what nature the grave dangers were supposed to be which threatened mercantile shipping from the naval units entrusted with the enforcement of the War Zone Declaration.

The only dangers to which a merchant vessel may, ac-

"They, therefore, give notice that the whole of the North Sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay and from warships searching vigilantly by night and day for suspicious craft. All merchant and fishing vessels of every description are hereby warned of the dangers they encounter by entering this area except in strict accordance with Admiralty directions. Every effort will be made to convey this warning to neutral countries and to vessels on the sea, but from the 5th of November onwards the Admiralty announce that all ships passing a line drawn from the Northern point of the Hebrides through the Faroe Islands to Iceland do so at their own peril.

"Ships of all countries wishing to trade to and from Norway, the Baltic, Denmark and Holland are advised to come, if inward bound, by the English Channel and the Straits of Dover. There they will be given sailing directions which will pass them safely, so far as Great Britain is concerned, up the East Coast of England to the Faroe Islands, whence a safe route will, if possible, be given to Lindesnaes Lighthouse. From this point they should turn North or South according to their destination, keeping as near the coast as possible. The converse applies to vessels outward bound. By strict adherence to these routes the commerce of all countries will be able to reach its destination in safety, so far as Great Britain is concerned, but any straying, even for a few miles from the course thus indicated, may be followed by fatal consequences."

cording to the general principles of International Law, be subjected on the part of a war ship are stoppage, search and bringing into port. Were these the dangers contemplated in the Declaration? This obviously cannot have been the case because such dangers already existed before the Declaration, they did not need to be created by "exceptional measures"; moreover they could not in the ordinary sense of the word be considered to entail "fatal consequences." It therefore cannot otherwise be assumed, than that the dangers announced were of a novel nature; that the Declaration meant that all ships encountered within the War Zone were liable to be immediately destroyed without warning by the British naval units.

That such is the only possible interpretation of the War Zone Declaration is also shown by the grounds given in its justification. There it is stated that a mine field discovered on the North Coast of Ireland could only have been laid by ships which, navigating along the usual trade route under the protection of a neutral flag, enjoyed the immunity of neutrals. Now, the Declaration stated, the usual trade routes were to be barred with the exception of a single arbitrarily defined course, and warned that outside of such course the gravest dangers were threatening, through mines *and* war vessels, yes, even, that any deviation of even only a few miles from the course might entail fatal consequences. This cannot be otherwise construed than that it was intended to gain freedom of action within the whole area outside of the course prescribed, in order no longer to be hampered by the considerations for safety and security which under International Law are due to the neutral flag on the high seas.

It suffices to study the English press of those days, whose source of information, especially in naval matters, is unquestionable, in order to find the confirmation that such alone was the true meaning of the War Zone Declaration. The naval expert of the "Times" on November 3, 1914, wrote:

"The document issued by the Secretary of the Ad-

miralty last night indicates that the Government have at last decided to treat the North Sea as *a military area* and *to adopt measures of a much more drastic description than those hitherto taken.* It has been suggested that the North Sea should be entirely closed to traffic. The naval authorities are not going as far as this. But they have defined an *area in which it will hereafter be dangerous to navigate, owing* partly to the mines which it has been necessary to lay, *and* partly *to the chance of being mistaken for an enemy. In fact, to be found in this area will in itself be so suspicious that no peaceful trader should be willing to incur it.* The area which is thus marked dangerous extends over a very large portion of the North Sea, and the restrictions which have now been put in force will have the effect of making it inexpedient, if not *impossible,* for *any merchant ship to attempt to enter or leave the North Sea by the passage between the Shetlands and Norway.* It is clearly stated, that ships passing a line drawn from the Northern port of the Hebrides through the Faroe Islands to Iceland *do so at their own peril."*

And in the "Times" of November 25, 1914, the same writer stated:

"The value of the new regulations restricting the movements of trade in the North Sea is that they should render the task of the Navy less difficult and dangerous. * * * *There should be a more effective control of the shipping now that it is to follow certain fixed routes or run the risk of being mistaken for an enemy.* * * * Every vessel entering or leaving the North Sea was, by the rule which made those waters a military area, obliged to pass through the Straits of Dover. But now it is said that the Norwegian-American line of steamers is to be permitted to use the Northern passage. This change in the circumstances seems likely to have an effect which may largely neutralize the good results expected from the new policy. At all events, it will no longer be the case that every ship found in the proscribed area can be regarded as an enemy. *The searching-business must begin all over again.* It can only be hoped that this departnure from the original policy has not been pressed upon the Admiralty against their will by the Foreign Office."

Also the Dutch Government was of the same opinion[22] as shown by its note of protest of November 16, 1914, addressed to the British Government, in which the following statement appears:

> "A sea of the expanse of the North Sea cannot in its entirety be considered as 'sphère d'action immediate des belligerants.' If this entire tract of water is treated as a war zone, it would mean a grave violation of the fundamental principle of the freedom of the seas, a principle which has been recognized by all the nations of the world."

The purpose of the British War Zone Declaration was therefore the creation of a war zone in the strictest sense of the word within which war could be waged against any ship encountered and within the bounds of which for that purpose the heretofore established rules of stoppage and search were no longer to apply![23] The ob-

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[22] The opinion that ships navigating the barred area in spite of the warning would be exposed to be fired upon immediately, was also shared by the Ambassador of the United States at Berlin, Mr. Gerard. This is to be inferred from the following:

Between the Ambassador and the then President of the Bremen Chamber of Commerce, Dr. Lohmann, negotiations were being conducted in October and November, 1914, as to the shipment of cotton to Germany. Germany wanted direct shipment to Bremen, the ships being on account of the danger from mines in the Southern part of the North Sea directed round the North of the British Isles. The Ambassador stated that this was impossible, and pointed out that the ships could take the course through the Channel allowed by the British Admiralty. On being questioned as to the real meaning of the Declaration of the British Government that navigation in the Northern part of the North Sea was dangerous since it was impossible on account of the great depth to plant mines there, the Ambassador replied that ships were liable to be fired at there without warning.

President Lohmann confirmed the substance of this conversation in a letter to the American Ambassador of November 16, 1914, suggesting that he take up the matter with his Government in order that safe passage might be insured to ships through the Northern part of the North Sea.

[23] The idea of a warfare of this kind was nothing new to the British public. It was, as is generally known, first given expression in literature by Sir Conan Doyle in his famous book on submarine war. During the very last weeks before the war the question was discussed in an extensive correspondence in the "Times." Among the letters there published is one of July 16 in which Admiral Sir P. Scott, replying to a statement of Lord Sydenham to the effect that submarine warfare was unlawful, wrote the following:

ject was by establishing a system of control permitting no escapes, to effectually insure the isolation of Germany from all import trade; a blockade was to be established without formally being declared. This purpose is not only made evident by the statement of the British Cabinet Minister, Mr. Winston Churchill, on November 9, 1914, cited above, according to which the British Government considered Germany to have been in a condition of blockade for the last three months, but is also again to be gathered from the opinions expressed by naval writers in the British Press. Thus the naval expert of the "Times" justifying the British blockade of the North Sea, writes in the following terms:

> "Since mines must be laid within the military zone, it is not our business to notify their exact position to

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"This I consider a dangerous and most misleading doctrine, because it is calculated to make the British public believe that their food supply will be safe in time of war. In order to make its fallacy manifest I will quote the following extract from a letter written by a foreign naval officer:

"'If we went to war with an insular country, depending for its food on supplies from oversea, it would be our business to stop that supply. On the declaration of war we should notify the enemy that he should warn those of his merchant ships coming home not to approach the island, as we were establishing a blockade of mines and submarines. Similarly we should notify all neutrals that such a blockade had been established and that if any of their vessels approached the island they would be liable to destruction either by mines or submarines and therefore would do so at their own risk.'

"Such a proclamation would, in my opinion, be perfectly in order, and, once it had been made, if any British or neutral ships disregarded it and attempted to run the blockade, they could not be held to be engaged in the peaceful avocations referred to by Lord Sydenham, and if they were sunk in the attempt it could not be described as a relapse into savagery or piracy in its blackest form. If Lord Sydenham will look up the accounts of what usually happened to the blockade runners into Charleston during the Civil War in America, I think he will find that the blockading cruisers seldom had any scruples about firing into the vessels they were chasing or driving them ashore, and even peppering them, when stranded, with grape and shell. The mine and the submarine's torpedo will be surer deterrents. Trade is timid. It will not need more than one or two ships sent to the bottom to hold up the food supply of the country."

It is furthermore worthy of note that the demand to close up the entire North Sea in the manner actually followed by the War Zone Declaration, had already been extensively discussed in the British Press in October, 1914; thus, for instance, two articles of the "Times" on October 20 and 21st, 1914, which leave no doubt as to the real purport of the War Zone Declaration.

those who can't stop sailing about in these waters. A general warning has been given, and if blockade runners run up against the mines, they have themselves to blame. I have been taken to count for using the expression 'blockade runners' because England has not declared a blockade of the German Coasts. Strictly speaking this is correct; but here again we have a wrong appreciation of the facts. *The Blockade as known to former times, has been superseded by mines and torpedoes.*"

The German War Zone Declaration, merely following the British example, had substantially the same purpose and aimed at the same object, as appears from its wording, and from the grounds stated in its justification in the note addressed to the neutral Powers on February 4, 1914. Both Declarations had the effect of barring a certain defined area of the high sea to trade traffic, not by declaring a blockade, the usual means recognized by International Law until the outbreak of the war, but by threatening immediate destruction to all ships encountered within the barred area after the time limit allowed in the notice had expired. Any differences which may exist, only refer to the procedure adopted by both sides in carrying out the measure; thus for instance, the German Declaration was directed solely against enemy ships, whereas the English Declaration affected all ships, including neutrals, and whilst a fourteen day notice had been given by the German Government, the British Government gave but two days.

4.

Was a Sea Blockade Known to International Law Before the War?

Was a sea blockade known to International Law before the War?

Disregarding the identity shown to exist between the two War Zone Declarations and the fact that those Declarations were by both sides justified as reprisals, and turning to the question whether under the rules of International Law such sea blockades are at all permissible, it will be found that the question raised is to be answered

in the affirmative rather than in the negative. The affirmative answer is supported by a precedent which was created by Japan. On January 23, 1904, a decree was issued in Japan establishing so-called "defensive sea areas." Under this Order tracts of the sea, even outside of the territorial waters of Japan, might in case of war be barred to navigation, on penalty of armed force being applied in case of contravention. Following this certain sections of the open sea as well as some straits were, as a matter of fact, during the Russo-Japanese War thus declared closed. Section 9 of the Ordinance enacted for the area of Tokio ran as follows:

> "Vessels which enter upon the barred area during night-time in violation of Section 7 do so at the risk of being fired upon by torpedo boats or patrol vessels."

Japanese Prize Courts even condemned a ship which had been encountered in one of the areas thus closed.

This example is taken from the publications of the American Naval War College ("International Law Situations, 1912").[24] There the question was raised whether an American cruiser in a war between two other States might convoy an American merchant vessel through such a barred area. The answer given is "no," and it is added that the captain of the cruiser should warn the Master of the merchant vessel from entering the barred area. In discussing the situation the following conclusions are finally arrived at:

> "The practice, nature of regulations, and drift of opinion seem to show that in time of war a belligerent is entitled to take measures for his protection which are not unreasonable. Certainly he is entitled to regulate the use of his territorial waters in such fashion as shall be necessary for his well-being. Similarly a belligerent may be obliged to assume in

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[24] In the "Times" of October 21, 1914, this case was discussed by Dr. A. Pearce Higgins as an example that parts of the High Sea can be barred to navigation or rendered dangerous for navigation by other means than a blockade.

time of war for his own protection a measure of control over the waters which in time of peace would be outside of his jurisdiction."

This precedent is the more important as, so far as is known, no Government raised objections to the aforementioned Japanese order. And its importance is further enhanced by the fact that also the Government of the United States, after its entry into the war declared a defensive area around the Coast of America.

5.

The German War Zone Declaration and the Neutral States.—Germany Declares Her Readiness to Stop Submarine Warfare as Contemplated by the War Zone Declaration.

Legal situation at the time of the enactment of the German War Zone Declaration.

The following must be borne in mind:

When the British Order declaring the North Sea to be a war zone November 2, 1914, was issued, no protest was made by the Government of the United States. That Government also in its note of December 26, 1914, refrained from raising any protest against the interference by Great Britain with direct trade with Germany. Also in their later correspondence with Great Britain and other Powers, so far as same has become known, the Government of the United States never questioned the validity or lawfulness of the British North Sea ban. *The British Declaration* barring the North Sea was *not even included in the official publications of the Government of the United States.*[25] Of the other neutral States, only Holland

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[25] Upon inquiry as to why such publication had not been effected, the Government of the United States gave the following reply:

"Department of State, Washington,
March 9, 1917.

My dear Mr. Tinkham:

I am in receipt of your letter of February 28, 1917, enclosing a communication from Mr. Emil Ahlborn, 258 Marlborough Street, Boston, Massachusetts, requesting that he be informed why this Government

protested. The protest of the three Northern States of November 18, 1914, cited above was merely directed in general against the laying of mines on the high seas and the interference of neutral trade by the arbitrary extension of the definition of "contraband." Even Germany and her Allies did not raise any protest when the Declaration was announced. Consequently the legal situation obtaining in February, 1915, was as follows: A measure heretofore unknown to the law of Nations had been submitted to by the Nations belonging to the community of International Law with one or a very few exceptions without remonstrance. Those members of the community primarily affected, namely, the neutrals, had furthermore submitted to the enforcement of the ban during three full months. The German Government were therefore entitled to hold that the action taken by Great Britain had been approved of in point of law by the majority of such Nations, and they thus had a right to expect that upon Germany's resorting to the same measures, their validity and lawfulness would not be disputed. But quite apart from this *it is clear that such neutral States as had not seen fit to raise objections to the British North Sea ban, and had submitted to it without protest, had forfeited the right to protest against a similar action on the part of the German Government, provided, of course, that they did not want to act contrary to their duties as neutrals.*

Thus the German War Zone Declaration was in any case justified, not alone as a retaliatory measure directed against the enemy.

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omitted from its official publication of the documents relating to belligerents and the rights of neutrals and commerce the British Admiralty order of November 2, 1914, declaring the North Sea a military area.

In reply, I would suggest that Mr. Ahlborn be informed that as it was impossible to publish all the material in the Department relating to the war and as the order of November 2, 1914, had already been made public by the Department, it was deemed unnecessary at the time to reprint the order in the official White Book.

I am, my dear Mr. Tinkham, very sincerely yours,

(Sgd.) ROBERT LANSING."

Attitude of neutrals towards the German War Zone Declaration.

In assuming, however, that the neutrals would preserve the same passive attitude towards the German War Zone Declaration as had been the case towards the British Declaration, the German Government found themselves mistaken. Protest was raised in particular by the Government of the United States. This was first taken to be the result of a misapprehension on the part of the Government of the United States as to the scope of the German Declaration, because protest was made against something that had not at all been contemplated, namely, against the supposed intention that also neutral merchant vessels were to be attacked in the German War Zone. The protest furthermore pointed out that the Government of the United States did not belong to those Governments which in the German note accompanying the War Zone Declaration had been reproached for having on the whole submitted to the illegal measures taken by Great Britain, and the American Government finally declared that the action contemplated by the German Government was of so unheard of a nature in the history of naval warfare that they could not believe that the German Government seriously held such action to be possible.

German reply to the Protest of the Government of the U. S.

This protest was answered by the German Government on February 16, 1915. It was again expressly confirmed that no attacks against neutral ships were intended. The German reply, however, refrained from citing the American protest note addressed to the British Government on December 28, 1914, in which the following passage was contained:

> "During the early days of the war this Government assumed that the policy adopted by the British Government was due to the unexpected outbreak of hostilities and the necessity of immediate action to prevent contraband goods from reaching the enemy. *For this reason it was not disposed to judge this policy harshly or protest against it vigorously,* although it was manifestly very injurious to American trade with the neutral countries."

And the German note, furthermore, forebore to answer

the contention of the American Government that Germany's action was without precedent, by pointing out that the Government of the United States had not seen fit to take any action against the very same measures when applied by Great Britain. On the contrary, the German reply was so studiously concerned with avoiding all harshness, that it even went so far as to suggest that the *American* Government should have their ships convoyed, in order thus to avoid the dangers arising in the war zone from the abuse of neutral flags by British ships. *The note finally stated that the German Government was prepared to desist from submarine warfare if America and the other neutral states saw their way to render possible the lawful importation of foodstuffs and industrial raw materials to Germany.*

German offer to stop submarine warfare.

Germany thus went a considerable way towards meeting the American viewpoint.

6.

American Proposal of Mediation.

Mediation Proposal of the Government of the United States.

The German note was followed by the offer of mediation on the part of the United States on February 21, 1915. Germany was to give up submarine warfare and acknowledge restrictions in the use of mines. England was to give up the abuse of neutral flags carried on by British ships at the order of their government, and to permit *foodstuffs to be conveyed to such firms in Germany as would be entrusted by the American Government with the distribution of food to the civilian population.* The German Government was to pledge itself not to requisition these foodstuffs.

Germany accepts the proposal, England rejects it.

The German Government by note of February 28, 1915, accepted the American proposal with a few secondary alterations.

The British Government on the other hand withheld their reply until March 15, and then declined. England thus refused to re-establish the observance of the most fundamental principle of universally acknowledged In-

ternational Law and of humanity, according to which food supplies which are intended for the civilian population of the enemy State may not be interfered with. And this, it should especially be noted, in spite of the fact, that the British Government were, through the system of supervision proposed, to be given a warranty by the most powerful neutral State, that the food supplies would be used exclusively for the benefit of the civilian population.

In a more undisguised form the purpose aimed at since the very beginning of the war, to bring Germany to submission by starving her civil population, could not have been expressed.

Great Britain, however, did not stop at this mere refusal; she held the proper time to have arrived to adopt all means within her power in order to attain her real purpose in the war, namely the annihilation of the economic power of Germany. This object, however, could not be achieved by the mere continuation of the measures of starvation so far applied. It was necessary to render all German export trade impossible. But that could not be done by means of a mere blockade following the rules of International Law. It was also from a military point of view not possible to blockade the whole German Coast Line. For these reasons, the British Government resorted to a method that had already proved effective since the first days of the war; they applied further measures of compulsion against the neutral states in order to prevent them from carrying on any trade at all with Germany. This was done by the Order in Council of March 11, 1915.

7.

Events Leading up to the Order in Council of March 11, 1915.

Events leading up to the Order in Council of March 11, 1915.

On March 1, 1915, the British Government addressed a circular note to the neutral governments informing them that in retaliation for acts alleged to have been committed by Germany, the British Government held them-

selves free to take into port all ships carrying goods of presumed enemy destination, ownership or origin. No statement was made to the effect that this was intended to be a declaration of blockade.

The American Government replied on March 9, 1915. They raised several questions as to the scope of the measures announced, which were summarized in the following passage:

> *"While the Government is fully alive to the possibility that the methods of modern naval warfare, particularly in the use of the submarine for both defensive and offensive operations, may make the former means of maintaining a blockade a physical impossibility, it feels that it can be urged with great force that there should be also some limit to the "radius of activity," and especially so if this action by the belligerents can be construed to be a blockade."*

This sentence makes the note in question one of the most important documents of the War. Its significance is shown by the British note transmitting to the Government of the United States the previously announced Order in Council, which had been in the meantime enacted on March 11, 1915. The note mentioned contains the following passage:

> *"At the same time Your Excellency notified me that while granting the possibility of using new methods of retaliation against the new use to which submarines have been put,"* * * * and, *"As well set forth by the Federal Government, the old methods of blockade cannot be entirely adhered to in view of the use Germany has made of her submarines, and also by reason of the geographical situation of that country."*

These arguments show that Great Britain held herself entitled to rely upon the previous American note in justification of her assertion that the Government of the United States *consented to Britain's enforcing the effects of a blockade against Germany, or, in other words, starving out Germany, without being bound by the rules of the*

Law of Nations concerning blockade. This alleged acquiescence of the United States, however, not appearing to the British Government as sufficient justification of the Order in Council, they furthermore contended in their note that the Government of the United States had *also agreed* to the adoption of new methods of reprisal against submarines, and to the restriction of the old rules of blockade in their application to such cases where the geographical situation of the country to be blockaded permitted such application!

In the notes published by the Government of the United States, no statement is to be found on which such contention could be based. On the other hand, the American Government took no steps to repudiate the attempt thus made to hold them bound to a statement they had never made.

8.

Order in Council of March 11, 1915. "So-called Blockade."

Order in Council of March 11, 1915.

The provisions of the Order in Council enacted on March 11 may be summarized as follows: There can be seized wherever encountered at sea, irrespective of the character of the vessel on which they are loaded, any goods:

a. That are bound for a German port, although they are intended for neutrals or are the property of neutrals.

b. That have been shipped in a German port, although they are intended for neutrals or are the property of neutrals or are of neutral origin.

c. That are being conveyed to a neutral port, if they are destined for the enemy, or are the property of the enemy.

d. That have been shipped in a neutral port, if they are of enemy origin, or are enemy property, whether or not they are intended for neutrals.

According to a note of March 15, 1915, it was, however, not the intention of the British Government to apply these provisions outside of European waters and of the Mediterranean. To this extent, therefore, the application of the new measures, which under the Order in Council applied in all waters, was subjected to a certain limitation.

Criticism of the Order in Council.

The Order in Council did not establish a blockade. It was clothed in the form of a retaliatory measure against the German submarine war. A blockade, moreover, would have had to comply with the rules of the Paris and London Declarations, as the British Government were signatories of the former and had by the Order in Council of October 29, 1914, expressly acknowledged the principles of the latter concerning the law of blockade to be binding. Under same, for instance, a blockade must be expressly declared. Such a declaration was not made. And the fact that in later notes the provisions of the Order in Council were declared to conform with the rules of the law of blockade, cannot be held to be a sufficient compliance with this requirement. A blockade may only be declared against the coast of the enemy, and cannot bar access to neutral coasts or ports. This principle was likewise disregarded. The provisions of the Order in Council were to apply in all European waters and in the Mediterranean. Thus no ship could reach a neutral port without crossing the blockade zone. Furthermore, however, the provisions of the Order in Council were to have the same effect with reference to ships bound to or from *neutral* ports of countries adjoining Germany, as with respect to ships bound to and from *enemy* ports.[26] A block-

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[26] (a) See in this connection the note of the United States of America of March 30, 1914:

"The note of His Majesty's Principal Secretary of State for Foreign Affairs which accompanies the Order in Council, and which bears the same date, *notifies* the Government of the United States *of the establishment of a blockade which is, if defined by the terms of the Order in Council, to include all the coasts and ports of Germany, and every port of possible access to enemy territory.* But the novel and quite unprecedented feature of *that blockade*, if we are to assume it to be properly so defined, is that it *embraces many neutral ports and coasts, bars access to them, and subjects*

ade must finally operate against all neutral States equally without discrimination. The British Naval Forces, however, were not in a position to insure such uniform application, because they could not stop the trade of the neutral Baltic States with Germany.[27] If, therefore, the Order in Council was to be construed as a blockade, it would not have been legally binding, because such blockade was not "effective" within the meaning of the London Declaration.

Under such circumstances it is obvious why the Order in Council did not declare a blockade, but was declared to be a retaliatory measure, intended to prevent any merchandise from reaching or leaving Germany. It was thus sought by means of the Order in Council to call forth the effect of a blockade, without formally declaring a blockade. In later notes to the Government of the United States the attitude was, however, taken up by the British Government that the Order in Council had established a blockade. This contention was based upon the allegation that conditions of modern trade traffic made it impossible to apply the old blockade rules to a country like

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all neutral ships seeking to approach them to the same suspicion that would attach to them were they bound for the ports of the enemies of Great Britain, and to unusual risks and penalties."

(b) See also "Times," January 27, 1916, Speech of Sir Edward Grey in the House of Commons:

"We are, I think, as one honorable member said, filtering the trade which passes through, with the object of stopping all the enemy trade. We are stopping the trade coming out, and we are also stopping the imports; more than that you cannot do. You cannot do more than stop all imports into the enemy country and all exports coming out. We are applying the doctrine of continuous voyage, and it is being applied now. On what other grounds are goods to neutral ports held up but on the ground of continuous voyage?"

[27] See note of the Government of the United States of America of November 5, 1915:

"Moreover, it is an essential principle which has been universally accepted that a blockade must apply impartially to the ships of all nations. This was set forth in the Declaration of London, is found in the Prize Courts of Germany, France and Japan, and has long been admitted as a basic principle of the law of blockade. *This principle, however, is not applied in the present British 'blockade,' for, as above indicated, German ports are notoriously open to traffic with the ports of Denmark, Norway and Sweden."*

Germany; the geographical position of Germany was such that under a blockade carried out according to the old rules, it would be possible to bring imports into Germany in spite of the blockade through neutral countries; thus the effectiveness of the blockade would be rendered illusory. It was, however, the right of a belligerent to stop the trade of his enemy. If this could not be done by applying the old rules of blockade, such rules might be adapted to the new conditions without violating the Law of Nations. Trade which on account of the geographical position and the special conditions of the enemy country sought its way through neutral territory might be treated in exactly the same manner as if it were directed to blockaded ports of the enemy.

Following this argument the rules of blockade may be altered, if without such modification a blockade declared would fail to fulfil its purpose by reason of the trade carried on through neutral countries. And such modification might, it was contended, consist in subjecting all goods on their way from or to Germany as well as all goods of German origin, even though they were being shipped from one neutral country to another, to seizure; in other words, the idea underlying the theory of continuous voyage was applied in its fullest consequence.

As to the first reason given for the modification of the rules of blockade, *i. e.*, the possibility that the trade of the blockaded country might be carried on through neutral territory, it is to be pointed out that such possibility was no novelty, but that it had already existed in former times. It has nevertheless at no time been held to be a sufficient ground for departing from the old established blockade rules. That is most clearly shown by a judgment of the Supreme Court of the United States pronounced during the American Civil War in the case of the "Peterhoff." The Court, according to Moore, International Law Digest, Volume VII, page 717, decided:

> "That 'neutral trade to or from a blockaded country by inland navigation or transportation' is lawful; and 'therefore that trade, between London and Mata-

> moras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and cannot be declared unlawful.' 'Such trade,' said the court, 'with unrestricted inland commerce between such a port and the enemy's territory undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country.'"

In any case the alleged new conditions already existed at the time of the London Conference. The British Government were nevertheless at that time not only of the opinion that no modification of the old blockade rule should be countenanced, but on the contrary vigorously upheld the old principles of the Law of Nations. Thus in the memorandum prepared for the Conference, they explicitly stated it to be their conception of International Law, that:

> "If a ship is not destined to a blockaded port, the circumstance that the goods carried on board are to be sent on from the port of destination by water or by land, is no ground for condemnation."

If, however, the ship is guilty of no breach of blockade, the cargo cannot be guilty of such breach, and is therefore exempt from seizure, even though destined for the blockaded country—unless the principle of continuous voyage is applied to such cargo. But that was, according to the British viewpoint,[28] impossible, as shown by the precedents quoted in the memorandum in support of the contention cited above, one of which precedents refers to case of the "Jonge Pieter." In this case the British Prize Court decided that goods shipped from London via Emden to Amsterdam, which port was blockaded, could not be condemned for breach of blockade. That these principles were actually in accord with

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[28] See Manual of Naval Prize Law, No. 73.

the generally recognized rules of the Law of Nations, is further shown by the fact that the same principles were adopted in the "Peterhoff" cited above.

Although these decisions only refer to the case of merchandise being consigned to a neutral port and thence forwarded by land to the blockaded country, the British memoraudum submitted to the London Conference expressly declared that the principle of continuous voyage should in no case apply to a blockade established according to the rules of International Law. This statement was accompanied by an explicit condemnation of the decision of the American Supreme Court in the case of the "Springbock." As a matter of fact, the London Declaration itself discarded the application of the principle of continuous voyage as in contradiction of the generally recognized rules of the Law of Nations. The British Government signed the London Declaration and thus showed that they were up to a short time before the war opposed to a modification of the old blockade rules, although fully alive to the fact that the provisions of the London Declaration made it impossible to stop importation to a blockaded country through neutral territory. The British Government was therefore not in a position to allege a new situation in order to justify their contention that the provisions of the Order in Council of March 11, 1915, were merely an adaptation of the old rules to new conditions.

The application of the principle of continuous voyage in such case would, moreover, lead to impossible consequences. The line of blockade would thus be advanced to the land boundaries separating the blockaded country from the adjoining neutral states. In this way, however, the neutral country would be placed in the role of a cooperator in the enforcement of the blockade. On the other hand, the application of the doctrine of continuous voyage would nullify the rule referring to effectiveness and territorial limitation of the blockade, because in such case the belligerent would be able not only to stop the trade passing through the blockade zone in front of the

enemy ports, but also, independent therefrom, to interfere with trade between neutral States. A blockade, however, is never intended to stop or to interfere with the trade of neutral countries with each other, but merely with the trade passing through the blockade zone.

Apart from the fact that the grounds on which the British Government claimed the right to modify the old blockade rules are untenable, and do not, therefore, justify such modification, an examination of the question as to whether the doctrine of continuous voyage is accepted by the Law of Nations, or is in accordance with the conception of law prevailing in the countries which adhere to the Community of International Law, reveals the following situation:

In justification of the measures adopted, the British Government referred, as shown above, to the decision of the American Supreme Court in the case of the "Springbock" as precedent, although they had rejected this decision in their memorandum to the London Conference. It is, therefore, necessary to discuss this judgment, it being, moreover, as a matter of fact, the only existing precedent, if any, which could be cited on this point. In such discussion the distinction must, of course, be left out of consideration, that whereas in the case of the "Springbock" a lawful blockade had been declared, and that the Court had, therefore, to decide upon a case of attempted breach of blockade, no blockade was ever declared against Germany in the recent war. The "Springbock" was an English bark, which, with her cargo, was, as shown by the papers of both ship and cargo, bound for the neutral port of Nassau (Bermuda Islands). Ship and cargo were condemned by the Court of First Instance. This decision was affirmed by the Supreme Court with respect to the cargo, but was reversed with regard to the ship. The proceeds of the portion of the cargo constituting contraband amounted to 1% of the entire proceeds.

With regard to this judgment, it must, in the first place, be pointed out that it obviously contains statements which are contradicted by the facts, thus, *e. g.*, the statement that

the intention of further shipment of the cargo of the ship, which, according to her papers, was bound for a neutral port, was to be inferred from the circumstance that the vessel intended for the further carriage was already lying at the port of Nassau, whilst, as a matter of fact, such vessel was at the time actually in England. In the second place, there was no proof of intended further shipment to a blockaded country, and the judgment had to rely on a mere presumption of such intention of further shipment to an indefinite blockaded port. Finally, it is apparent that the law was not correctly applied in the matter of admission of evidence, in consequence of which the parties interested were prevented from producing evidence in rebuttal. These facts alone suffice to show that the judgment was substantially incorrect, and that it therefore can not be relied upon as a precedent, even if it were otherwise found to conform with the principles of International Law.

In this respect it may, in the first case, be said that the wording of the judgment does not permit of ascertaining whether the condemnation of the cargo was ordered in application of the principle of continuous voyage to a case of shipment of contraband, or of breach of blockade. Most authors who have dealt with this case have taken the latter view.

The British Government, on the other hand, appear at the time of the London Conference to have taken the stand that it was rather a case of contraband shipment. In any case, they declined to accept this judgment as a precedent for the rules of blockade law.[29] Likewise the Government of the United States of America seems

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[29] See the Instructions issued to the British Delegates to the Conference:

"It is exceedingly doubtful whether the decision of the Supreme Court was in reality meant to cover a case of blockade-running in which no question of contraband arose. Certainly if such was the intention, the decision would *pro tanto* be in conflict with the practice of the British Courts. His Majesty's Government sees no reason for departing from that practice, and you should endeavor to obtain general recognition of its correctness."

to have considered the decision as a precedent of contraband law.[30] If it, however, be assumed that the judgment relates to blockade law, then even in such case it could only be relied upon as a precedent applying the doctrine of continuous voyage to goods subject to reshipment at a neutral intermediate port for further transportation *by sea* to the blockaded country. But it could not be relied upon as establishing the same rule with reference to goods which are proved or presumed to be ultimately destined to the blockaded country by way of land transport. The decision of the American Prize Court in the case of the "Peterhoff" would be directly opposed to such construction. Finally, the "Springbock" judgment could not be relied upon as a precedent justifying the seizure of goods acquired by a neutral from the enemy and exported from the enemy country in the due course of peaceful trade by land. For such proposition no precedent exists.

But the judgment in the case of the "Springbock" can under no circumstances be considered as a precedent at all. A Prize Court decision can at the best be held to create International Law if it is approved of by the community of the Law of Nations. This, however, has not been the case. For few judgments have been more unanimously criticised than this decision;[31] scarcely any author has dared uphold it. And that is comprehensible if it is

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[30] Such can be the only meaning of the following statement in the note of the United States of November 5, 1915:

"Since the Government of Great Britain has laid such emphasis on the ruling of the Supreme Court of the United States in the Springbock case, that goods of contraband character seized while going to the neutral port of Nassau, though actually bound for the blockaded ports of the South, were subject to condemnation, etc."

[31] See the note of the British Government to the Government of the United States of July 23, 1915:

"* * * Your Excellency will remember the unmeasured terms in which a group of prominent international lawyers of all nations condemned the doctrine which had been laid down by the Supreme Court of the United States in the case of the Springbock."

recalled that one of the Judges who took part in its framing at a later date made the following statement:

> "The truth is that the feeling of the country was deep and strong against England, and the judges, as individual citizens, were no exception to that feeling. *Besides, the Court was not then familiar with the Law of blockade.* * * * Now that the passions and prejudices of the hour have passed away, there cannot be two different opinions in the case."

How little, however, this judgment was in conformity with the principles of International Law no one has more convincingly shown than Mr. Evarts, who at a later date became Secretary of State of the United States, and, following him, Sir Travers Twiss. It may suffice to quote the following from the writings of Mr. Evarts:

> "Upon the whole, then, it is respectfully submitted, that the case of the 'Springbock's' cargo, if suffered to remain unreversed as a rule of the law of nations, *gives to belligerents a power which, heretofore, they have never dared to claim, and subjugates the commerce of neutral nations to belligerent exigencies in an extent never before submitted to, an extent not tolerable either to their interests or their pride.*
>
> "The rule thus established gives to the cruisers and the Prize Courts a wider and more uncontrolled sweep of interference with commerce between the proscribed neutral ports than they possess in respect to commerce between neutral and belligerent ports.
>
> "A paper blockade of the neutral ports, not tolerable towards the enemy's ports, capture and sending in for adjudication vessels that cannot by possibility convict or acquit themselves on the primary proofs—for they cover only the present and innocent voyage—condemnation upon intent of future voyage, not commenced, necessarily upon extraneous proofs, if it all—all these strange consequences follow from this new doctrine of belligerent right and neutral subserviency."

Sir Travers Twiss, on the other hand, wrote:

> "If upon two such fundamental questions of the Law of Nations as contraband of war and breach of

> blockade, a great Power is at liberty to make innovations at its discretion in its own interest as a belligerent, evil days are, I fear, in store for the weaker States, as neutrals."

Nobody has visualized the scope of this judgment better than Sir Travers Twiss!

Is it possible for such judgment, which overrides all principles of the Law of Nations, to be a source of International Law? British Prize Courts, at any rate, would seem bound to reject such judgment as a precedent, unless they wish to abandon the fundamental principle laid down by Lord Stowell in the case of "The Glad Ogen," according to which it is the duty of the Prize Court

> "not to admit, because one Nation has thought fit to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner that they are on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance independent of all practice from the earliest history of mankind."

The British Government cannot therefore rely upon the decision in the case of the "Springbock" as a precedent justifying the provisions of the Order in Council. If this, however, be so, the entire structure of British arguments in support of such measures collapses. And it is to be placed on record that the provisions of the Order in Council are not only in conflict with the principles of the Law of Nations, but that they contemplate a course of action which has always been regarded as unlawful by the community of civilized nations and in particular by the British Government themselves.

Under such circumstances it is to be understood why the Order in Council was declared to be a retaliatory measure. By such designation, however, it is conceded that the British Government, at least at the time of the publication of the Order in Council, were not yet of the opinion that its provisions were merely a lawful adaptation of the rules of blockade to existing conditions. Had

such been the opinion of the British Government, they could and ought to have declared a blockade. By not so doing they admitted that the Order in Council was not in conformity with the principles of the Law of Nations and consequently could only be justified as a retaliatory measure. But the provisions of the Order in Council not only amounted to a complete negation of the law of blockade as laid down in the Declarations of Paris and London. By permitting the seizure of enemy goods on neutral ships they also violated the second rule of the Paris Declaration; according to which the neutral flag protects enemy goods with the exception of contraband.[32] As a matter of fact, the British Government went even a step further, as under the Order neutral goods on board neutral ships were liable to seizure, if of enemy origin.[33]

But now the question arises whether the Order in Council was a lawful reprisal. This question, too, must be answered in the negative. Aside from the fact that it constituted a reprisal against a lawful act of retaliation, namely, against the German submarine war, a reprisal may only be resorted to if and so far as is necessary to repress a breach of the law. If, therefore, the party guilty of the first breach agrees to discontinue his unlawful course of action, there is no longer any ground for retaliation, the reprisal having already fulfilled its purpose.

Now, the German Government had already, before the

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[32] See note 5, above, and also the notes of the Dutch Government of March 19, 1915, and of the Government of the United States of March 31, 1915. The British Government in their note of July 24, 1915, to the American Government attempted to deny this. But that does not alter the fact that according to the clear wording of the Order in Council the mere ascertainment that goods are enemy owned suffices to justify their seizure. With reference to such goods no proof is therefore required that they have enemy destination or are of enemy origin.

[33] How far the British practice on this point was carried, is shown by the treatment of the bunker coal on neutral ships. If such coal was of German origin it fell within the scope of the provisions of the Order in Council. These provisions were thus not restricted in their application to goods exported through neutral territory to other neutral countries. The Order in Council likewise embraced neutral goods which were only partially manufactured from material of German origin.

Order in Council was enacted, declared its readiness to stop submarine war, if Great Britain would consent to comply with certain fundamental principles of International Law she had departed from. It, therefore, rested solely with the British Government to eliminate the causes of the first reprisal. The British Government, however, failed to do so, because they rejected the proposal submitted by the Government of the United States after Germany had declared her readiness to stop the submarine war. It, therefore, must be presumed that it was not the purpose of the Order in Council to compel the alleged lawbreaker to discontinue his unlawful practices, but that the German submarine war was merely used as a pretext to enforce measures which in the absence of such pretext would have had no justification at all, which, however, the British Government, in the light of their own experiences in former wars, considered as very helpful in defeating the enemy. The order was thus merely a link, although the most important link, in the chain of measures which were destined to render possible the attainment of the British war aim, namely, the destruction of the physical and economic life of Germany. To attain this aim by the means theretofore employed seemed problematical, but a sure road to its fulfilment appeared to offer itself by cutting off Germany from all imports and exports and repressing and destroying every kind of economic activity on the part of Germany outside of her frontiers. The purpose of the Order in Council thus lay within itself; it was not intended to compel Germany to give up submarine warfare. In this sense only the Order was construed, even in Great Britain, as is shown by the "Times History of the War," Volume 7, on page 390. After stating that, in spite of all measures taken, Germany was still receiving goods from abroad, the writer there goes on to say:

> "A pure contraband policy was inadequate, *and it happened, and not altogether unfortunately,* that the reckless German undersea policy made reprisals legally possible, and brought about the famous Order in Council of March 11, 1915."

9.

The Order in Council of March 11, 1915, and the Neutral States.

Attitude of Foreign States toward the Order in Council of March 11, 1915, and its enforcement.

Practically all neutral States raised most emphatic protests against the provisions of the Order in Council of March 11, 1915, but all without avail. In these protests it was most convincingly shown to what extent the provisions of the Order in Council were at variance with all principles of International Law, and what unprecedented interference with the sovereignty of neutral States they constituted. Thus the Government of the United States in their note of protest of March 30, 1915, took up the following attitude:

> *"The Order in Council of the 11th of March would constitute, were its provisions to be actually carried into effect as they stand, a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace;* * * * moreover, the rules of the Declaration of Paris of 1856, among them, that free ships make free goods, will hardly at this day be disputed by the Signatories of that solemn agreement * * * * and no claim on the part of Great Britain of any justification for interfering with the clear rights of the United States and its citizens as neutrals could be admitted. *To admit it would be to assume an attitude of unneutrality toward the present enemies of Great Britain which would be obviously inconsistent with the solemn obligations of this Government in the present circumstances."*

Any comment upon these words would only lessen their power.

This protest, however, shared the fate of all former protests in having no effect whatever on the attitude of the British Government. Without any scruples, they continued—and the French Government, as usual, followed their example—to pursue the course announced.

The American protest was not answered until four months later, namely, on July 24, 1915. The reply was in

the negative; the provisions of the Order in Council were carried out as before. On November 5, 1915, after they had been enforced during eight full months, the Government of the United States protested anew. The unlawfulness of the British course of action was again demonstrated by extensive and irrefutable arguments. And a long list of ships was added that had in the intervening time and in spite of the American protests been detained by Great Britain. The note culminates in the following statement:

> "Before the closing this note, in which frequent reference is made to contraband traffic and contraband articles, it is necessary, in order to avoid possible misconstruction, that it should be clearly understood by His Majesty's Government that there is no intention in this discussion to commit the Government of the United States to a policy of waiving any objection which it may entertain as to the propriety and right of the British Government to include in their list of contraband of war certain articles which have been so included. The United States Government reserves the right to make this matter the subject of a communication to His Majesty's Government on a later day.[34]
>
> "I believe it has been conclusively shown that the method sought to be employed by Great Britain to obtain and use evidence of enemy destination of cargoes bound for neutral ports and to impose a contraband character upon such cargoes are without justification; *that the blockade, upon which such methods are partly founded, is ineffectual, illegal and indefensible;* that the judicial procedure offered as a means of reparation for an international injury is inherently defective for the purpose; and that in many cases jurisdiction is asserted in violation of the *law of Nations. The United States, therefore, cannot submit to the curtailment of its neutral rights by these measures which are admittedly retaliatory, and therefore illegal, in conception and in nature,* and intended to punish the enemies of Great Britain for alleged illegalities on their part. The United States might not be in

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[34]As stated above, this protest was never made.

a position to object to them if its interest and the interest of all neutrals were unaffected by them, but being affected, *it cannot with complacence suffer further subordination of its rights and interests to the plea that the exceptional geographic position of the enemies of Great Britain require or justify oppressive and illegal practices.*

"The Government of the United States desires, therefore, to impress most earnestly upon His Majesty's Government that it must insist that the relation between it and His Majesty's Government be governed, not by a policy of expediency, but by those established rules of international conduct upon which Great Britain in the past has held the United States to account, when the latter nation was a belligerent engaged in a struggle for national existence. *It is of the highest importance to neutrals not only of the present day, but of the future, that the principles of international right be maintained unimpaired.*

"This task of championing the integrity of neutral rights, which have received the sanction of the civilized world against the lawless conduct of belligerents arising out of the bitterness of the great conflict which is now wasting the countries of Europe, the United States unhesitatingly assumes, and to the accomplishment of that task it will devote its energies, exercising always that impartiality which from the outbreak of the war it has sought to exercise in its relations with the warring nations."

Even in this case the British Government allowed five months to elapse before answering the protest. The reply dated April 24, 1916, refused to acknowledge the protest. And, as before, the measures provided for in the Order in Council of March 11, 1915, continued to be enforced in the most unscrupulous manner. Until the severance of diplomatic relations with Germany in February, 1917, no further protest was raised by the United States Government.

Thus the so-called blockade could be carried out unrestrictedly from the beginning of March, 1915, until February, 1917, *i. e.*, during almost two whole years, and this in spite of the fact that the American Government had already in their note of March 30, 1915, stated:

> *"To admit it would be to assume an attitude of unneutrality* toward the present enemies of Great Britain, which would be obviously inconsistent with the solemn obligations of this Government."

Also against the inhuman war of starvation carried on by Great Britain the American Government at no time during the war found such powerful words of condemnation as contained in a note of the same Government by Mr. Sherman on June 26, 1897, in protest against the attempt of Spain to starve out Cuba:

> "Against this deliberate infliction of suffering on innocent non-combatants, against such resort to instrumentalities condemned by the voice of human civilization, the President is constrained to protest in the name of the American people *and in the name of common humanity.*"

10.

Extension of the So-called British Blockade by Additions to the List of Absolute Contraband, and by Repeal of Article 57 of the London Declaration.

Extension of blockade by additions to list of absolute contraband.

The rules of blockade were, however, not the only sphere of law for which Great Britain and her Allies substituted their arbitrary will. The same course was adopted in all the other fields of the Law of Nations.

In particular the list of articles of absolute contraband was continually enlarged. On December 23, 1914, it had been brought up to 29 items; it contained, *inter alia,* numerous metals and ores; by the Order in Council of March 11, 1915, there were added to it wool, zinc and lubricants. Further additions were made on May 27 and August 20, when cotton and even cotton textiles were declared to be absolute contraband! Cotton was not used in Germany at all for war purposes; apart from the textile industry, it was solely employed for surgical treatment. By Order in Council of October 14, 1915, further additions were again made. The list now contained 42

items, and comprised practically all materials necessary in human life, with the exception of foodstuffs which were allowed to remain on the list of conditional contraband. To find in this list the application of the principle that only such materials constitute absolute contraband as are utilized *exclusively* for war purposes, would be a futile undertaking. On January 27, 1916, and on April 12, 1915, further extensions were announced, in which even soap was declared absolute contraband.

Finally, on April 13, 1916, the last mask was dropped. The British Government on that day published *an alphabetical list of all contraband articles, at the same time stating, by way of explanation, that the difference between absolute and conditional contraband had practically ceased to exist.* In so doing they at last openly avowed the existence of a situation that had as a matter of fact obtained since the very first days of the war, namely, that the British Orders in Council of August 20 and October 29, 1914, had abolished any difference between the two classes of contraband.

But even this alphabetical list underwent further extensions on June 27, October 3, and November 23, 1916. The list now contained approximately 230 items. Thus practically nothing any longer existed that was not contraband. If an article had been omitted in the list, the British Prize Courts nevertheless declared it to be contraband; thus, for instance, it was decided that skins and casings, which could be utilized for the manufacture of sausages, were to be considered as foodstuffs.

Extension of the British blockade by the repeal of Article 57 of the London Declaration.

In the meantime, however, a further Order in Council had been enacted, regulating the trade of neutrals, which in this respect ranked next in importance to the so-called blockade of March 11, 1915. This was the Order in Council of October 20, 1915, by which Article 57, Paragraph I, of the London Declaration was repealed. According to that provision, the enemy character of a ship is determined by the flag she is entitled to fly. For that provision there was now again to be substituted the rule formerly applied by the British Prize Courts. Such rule

had even at the time of the London Conference appeared to the British Government to be so unjust that Sir Edward Grey instructed the British delegate to agree to a modification, *"because the application of the old rule led to an absurdity."* Now, this step forward was again revoked on the grounds "that it was no longer expedient" to adhere to the aforementioned article of the London Declaration.

The scope of this Order in Council is to be gathered from the fact that from now onward no neutral ship belonging to a corporation was safe from capture if even a single share of such corporation belonged to an enemy subject. Thus a great stroke had again been made towards submitting the merchant fleets of neutral States to the control of British warfare.

11.

Results of the "So-called Blockade" According to the "White Paper" of January 5, 1916.

English White Paper of January 5, 1915.

The effects which the so-called Blockade had already in the first year of its enforcement produced upon the economic life of both Germany and neutral countries were far reaching. To enumerate these in detail would be to go beyond the object of this memorandum. It may, therefore, suffice to refer to the white paper issued by the British Government on January 5, 1915. This white paper, which shows with blunt frankness how Great Britain was pursuing her object, without letting herself be influenced by considerations of legality—reference may be made to Mr. Asquith's public statement in the House of Commons that England would not allow "juridical niceties" to interfere with her conduct of the war—also proves that the British Government had not the slightest intention of yielding to the serious protest which had been lodged by the Government of the United States two months before, on November 5, 1915, for it was now declared that the so-called blockade would be enforced further, and for this purpose even neutral States would be put on rations.

The white paper begins with a survey of the legal situation as existing up to the time when the Order in Council of March 11, 1915, was issued. No reference, however, is made to the manner in which the principles of law had been put into practice. Instead, the measures applied in the enforcement of the so-called Blockade, and the results obtained thereby, are discussed in great detail.

It is, in the first place, announced that German export trade to overseas countries had been entirely stopped; that imports to neutral countries adjoining Germany had been brought under strict control for the purpose of finding out whether any article imported might be intended for Germany; that wherever a sufficient ground for such presumption existed, the goods were turned over to the Prize Court; and that sufficient grounds for such presumption were considered to exist wherever the goods were not consigned to one of the Import-or Control-Organizations[35] which had been established in neutral countries under pressure of the British Government or where such organizations did not offer sufficient guarantees, or where the importation had taken place without the necessary British permit. That other merchandise, as to the destination of which doubts were entertained, was held until the necessary guarantees were supplied. That agreements had been entered into with the aforementioned import-or control-organizations, for the purpose of preventing any trade of the neutral country in question with Germany, whether in the *home products* of such country *or in products imported from oversea.* That shipping companies had been compelled by the heavy losses incurred through their ships being brought into English ports and through their being refused bunker

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[35] In Holland the "Nederlandsche Overzee Trust" (N. O. T.), in Denmark the "Grosserer-Societät" and the "Industrierat"; in Sweden the "Transito" Company, Inc., with whose activities, however, the Swedish Government endeavored to interfere as much as possible; in Switzerland the "Societe Suisse de Surveillance Economique" (S. S. S.). In Norway the establishment of special organizations was not necessary, as the British Ambassador there was openly in control of the economic policy of the country.

coal in English ports, to enter into agreements which prevented any materials shipped by them or any articles manufactured from such materials from reaching Germany. That those companies had further been persuaded to voluntarily send their ships into English ports to be controlled. That many of these companies had given up trading with German ports, and that before any goods were accepted for shipment, inquiry was made with the British Government whether difficulties were to be expected. Finally, that it was the primary object of the British Government, and that this object had already to a large extent been attained, to introduce a system of rationing in neutral countries, under which only such goods were allowed to be imported into these countries as were indispensable for their own consumption.

So far the white paper. In reality, however, the neutral States were not even permitted to import to the full extent of their requirements, but were on an average curtailed by about 33% of their imports in 1913.[36] The result was that finally the neutral States of Europe could no longer obtain sufficient foodstuffs for supplying their populations on the pre-war standard, and were, therefore, compelled on their own part to proceed to rationing.

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[36] This statement was made by the British Government themselves in a written answer to a question in parliament. The report of the "Times" (Nov. 1, 1918) runs as follows:

"Sir L. Worthington Evans, in a written answer to Sir Richard Cooper, says: A proper understanding of the effects of the blockade can be obtained by comparing the imports into neutral countries adjoining the enemy retained for home consumption in 1913, with similar imports from all countries in 1917. Such a comparison shows that on the average the imports have been reduced to about 33 per cent."

12.

Order in Council of March 30, 1916; Repeal of Article 19 of the London Declaration.

Order in Council of March 30, 1916; repeal of article 19 of the London Declaration.

The results obtained did not, however, apparently satisfy the British Government. They evidently feared that the measures taken would not suffice to enforce rationing to its full extent, and they, therefore, went about to devise new means of coercion against neutral trade.

On March 30, 1916, a new Order in Council was issued. As mentioned above, the Order in Council of October 29, 1914, had recognized the rules of the London declaration as to blockades, and thus, also, its Article 19, as binding. This provision reads:

> "Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port."

This provision abolished the principle of continuous voyage, as far as the law of blockade is concerned. As has already been pointed out, the adoption of the provision had at the time been expressly recommended by the British Government. Now, it was again repealed, and the grounds stated were *that it was no longer expedient* to observe it.

No blockade having been declared, it is not quite clear what the new provision aimed at. One result was, at any rate, undoubtedly achieved, namely, an increased disturbance of neutral shipping, which believed that this meant the introduction of more stringent blockade rules for which the British press had been clamoring, and that ships and their cargoes would now be liable to condemnation for breach of blockade.

The order, furthermore, contained the following provisions:

> 1. No provision of the Order in Council of October 29, 1914, was to have the effect of restricting the right to seize goods of conditional contraband which, on their way to the enemy, are to be trans-

shipped in a neutral country or are to be forwarded to the enemy country by way of land transport.

2. In the case of contraband, the presumption of enemy destination shall arise wherever the consignees have, during the present war, at any time forwarded to the enemy country imported articles of contraband. At the same time, it is provided that the presumption of enemy destination in the case of contraband consigned to an agent of the enemy state or "to order" etc., shall arise not only in the case of conditional but also in the case of absolute contraband. Finally, it is provided that in all these cases the burden of proof shall rest upon the owner of the goods.

These new provisions had the effect of expressly and specifically abolishing the distinction between absolute and conditional contraband, which, as a matter of fact, had ceased to exist in practice since the outbreak of the war, as shown by the above-mentioned alphabetical contraband list published on April 13, 1916. The Order in Council was, therefore, obviously intended to alter the rules of law in accordance with the existing practice. In particular, however, the provision under which enemy destination is presumed in the case of shipments to persons who during the war have forwarded imported contraband articles to the enemy country clearly reveals the tendency of all British measures. The purpose aimed at was to bring such pressure to bear upon neutral trade by means of fines and forfeits that it would be led by the fear of such penalties to submit unconditionally to the British measures. Such action, however, goes distinctly beyond the powers conferred upon belligerents by the principles of contraband law, as under same contraband goods may only be seized if they are actually destined to enemy territory, and not by way of penalty for a previous trading in contraband articles.

13.

Abrogation of London Declaration by Order in Council of July 7, 1916.

Order in Council of July 7, 1916; repeal of the London Declaration.

In all these enactments the fiction that Great Britain was adhering to the law of the London declaration, with the exception of the "additions and modifications" contained in the various orders, was still maintained. But this fiction could at last no longer be upheld, and was therefore discarded by the Order in Council of July 7, 1916. The British Government, and simultaneously the Government of France, now revoked the assurance given in August and October, 1914, that they would in principle follow the rules of the London Declaration. All enactments made theretofore were replaced by the following rules:

(a) The hostile destination required for the confiscation of contraband articles shall be presumed to exist, until the contrary is shown, if the goods are consigned:

to or for an enemy authority, or an agent of the enemy state; or

to or for a person in territory belonging to or occupied by the enemy; or

to or for a person who during the present hostilities has forwarded contraband goods to an enemy authority or an agent of the enemy state or to or for a person in territory belonging to or occupied by the enemy; or

"to order"; or

if the ship's papers do not show the real consignee of the goods.

(b) The principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and of blockade.

(c) A neutral vessel carrying contraband with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an en-

emy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage.

By this Order in Council the situation was revealed at last in its true light. With the principles of international law these enactments had but little in common. They are subject to the same criticism as has been applied to the various Orders in Council, because there was no substantial difference between these enactments.

And so the British Government found no one to believe what had been said in the preamble of the Order in Council, namely, that these rules were in strict accordance with the law of nations. Thus the Government of the Netherlands on August 2, 1916, gave the following reply thereto:

> "Pour le reste, le nouvel Ordre sanctionne, en toutes lettres, la practique déjà suivie sous la vigueur des Ordres précédents et *d'après laquelle la distinction faite entre le traitement de la contrabande conditionelle et celui de la contrabande absolue est complètement éliminée.* Or, d'après les règles anciennement reconnues du droit des gens, la contrabande conditionelle n'est saisissable que sur le navire qui fait route vers un territoire appartenant à ou occupé par l'ennemi ou vers ses forces armées et seulement dans le cas, ou elle est destinée aux forces armées ou au Gouvernement d'un Etat belligérant.
>
> *"En vue de ce qui précède, la Gouvernement Néederlandais ne saurait partager l'opinion au Gouvernement Brittanique que le nouvel Ordre est en stricte conformité avec le droit des gens."*

This criticism by the Dutch Government appears still more justified if the French decree of July 7th, which likewise repealed the London Declaration, is considered. According to same, the fact of more than one-half of a ship's cargo being contraband suffices not only to condemn the ship but also her non-contraband cargo.[37] The French Government, it is true, on August 7, 1916, replied, stating

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[37] "Lorsque les merchandises de contrebande de guerre saisies sur un navire forment, par leur valeur, leur poids, leur volume ou leur frêt, plus de la moitié de la cargaison entière sont sujets à confiscation."

that such had not been the intention of their decree. But this cannot alter the fact that the decree explicitly enacts the confiscation of non-contraband cargo.

14.

Further Measures Adopted in Pursuance of British Trade Warfare.

Other British measures against German trade.

As in the case of maritime trade, so also in all other fields of economic life, Great Britain and, following her, her allies recognized no other restrictions than those prescribed by their own interests. The latter, however, required the entire destruction of all business activity in which German interests might participate.

In the first place, the German mails had early in the war been placed under control. Alone in the months from January to September, 1916, there were thus confiscated about 24,000 mail bags coming from Germany and 16,800 bags destined for Germany. The same situation applied to neutral mails.[38] Neutral mail steamers were at all times brought into British ports. There the entire mail was removed from aboard the vessel and examined. Protests of neutral Governments, also of the United States, did not have the slightest effect on this system of mail robbery, one of the primary purposes of which was the exploitation of the mail thus confiscated in the interest of British trade. On the contrary, the officially sealed mail of neutral Governments and their representatives was taken away.

Also the provisions against trading with the enemy were extended beyond all measure. To prohibit trade with the enemy is in itself an infringement of Section 23h of the Hague Rules on land warfare.[39] But this principle

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[38] See the memorandum of the British and French Governments of April 3, 1916, to the neutral governments as to the search of parcel post and mails.

[39] See II. H. C. A. IV of October 18, 1907, annex to convention 4, Section 23, which prohibits:

"(h) The abrogation or the temporary suspension of the rights and claims of enemy subjects or their exclusion from the right of action."

was simply overridden by declaring that it only applied to countries the laws of which did not provide for prohibiting trade with the enemy, and which therefore required special legislation to introduce such measures. In England, however, such restraint being an integral part of the law of the land, taking effect automatically upon the outbreak of a war, no special enactments were required for its enforcement and therefore Section 23h was not violated.

A criticism of such argumentation is unnecessary.

The provisions prohibiting trade with the enemy did not even stop before the sovereignty of neutral States, because they ultimately even interfered with the trade of neutrals among each other. For, in the so-called "black lists" drawn up in accordance with these provisions, neutral persons residing in neutral countries were also included, and it was announced that any neutral who should attempt to do business with a person included in the black list would himself be placed on such list. A person whose name appeared on the black list was, however, deprived of all rights, just like a German, like an enemy. His shipments, for instance, were, under the Order in Council of March 11, 1915, subject to seizure. As shipowner, his ships in English ports were denied coal, provisions, and even drinking water; he was refused meals in British inns, shelter in British hotels, medicine in British pharmacies.

The Government of the United States also vainly protested against such practices. In their note of July 31, 1916, the following passage is to be found:

> "The Government of the United States may call attention to the fact that the citizens of the United States are subject only to strictly defined *international usages and agreements which, in the opinion of the Government of the United States, have too often and too lightly been disregarded by the Government of Great Britain.*"

In this connection mention ought also to be made of the action taken against German commercial undertak-

ings in England and in British colonies. These undertakings were not only submitted to supervision, were not only liquidated—in numerous cases the business books and papers were, after the liquidation had been carried through, destroyed; even the papers relating to the liquidation!

In this manner all the principles of International Law governing the rights of neutrals in their relations with belligerents were completely abrogated.

Neutral trade still existed only so far as it had submitted itself fully and unconditionally to the measures taken by Great Britain and her allies.

England's maritime war policy was governed exclusively by the principle "Might is Right."

Germany's enemies were acting in thorough accordance with the principle that Canning had proclaimed in the following words:

> "I protest against the doctrine of half measures and forbearance in war, for where rigour has a tendency to decide the war, hesitation is cruelty."

Or, according to the words of Lord Fisher:

> "If I am in command when war breaks out I shall issue in my orders:
>
> The essence of war is violence,
> Moderation in war is imbecility,
> Hit first, hit hard, and hit anywhere!"

15.

German Maritime Warfare up to May, 1916, Within the German War Zone.

So much as to the sea warfare carried on by Great Britain and her allies.

German maritime warfare up to April 24, 1916.

How had Germany in the meantime been conducting her naval warfare?

The offer of mediation extended by the United States on February 22, 1915—which, as was shown above, aimed at inducing Germany to give up submarine trade warfare as contemplated in the war zone declaration, in consideration of Great Brotain's allowing foodstuffs intended for the German civil population and shipped from over-

sea countries to reach Germany and there to be distributed among the civil population under the control of the Government of the United States—had been rejected by the British Government. Thus all possibility of an understanding was removed. Germany was now compelled, since Great Britain insisted upon the continuation of war of starvation, to use the same weapon. Submarine warfare in accordance with the war zone declaration was now begun. The German submarines followed the orders received, to the effect that enemy ships were to be destroyed, neutral ships to be spared. If a neutral ship, in spite of all the precautions taken, unintentionally came to grief through the attack of a German submarine, the German Government immediately gave full satisfaction.

In order, however, to avoid confusions which were bound to arise from the abuse of the neutral flag ordered by the British Government, it was suggested to the neutral governments to distinguish their vessels by painting special neutrality marks on the sides, and illuminating same at night time. Furthermore, the German Government suggested to neutral states that they have their vessels convoyed according to the Rules of the London Declaration which had also been acknowledged by Great Britain. This proposal could not, however, take effect as the British Government refused to recognize convoys.

After the sinking of the "Lusitania," which occurred on May 17, 1915, the German Government issued orders to their submarines to spare not only neutral ships but also enemy passenger steamers. Then, about the middle of September, by a secret order, the complete cessation of submarine warfare according to the war zone declaration was decreed. At the end of November it was again partially resumed, subject, of course, to all limitations existing before, in a strictly defined zone which was particularly frequented by troop and munition transports. At the same time, however, it was sought, by dispatching a submarine from time to time to other ports, to avoid the order as to the actual cessation of submarine warfare from becoming known.

Towards the end of the year conclusive proof fell into the hands of the German Government by way of secret orders found on enemy ships that armed enemy vessels had been commanded to make use of their armament for purposes of attack. That such an order had actually been issued by the British Admiralty had already become apparent in many cases from the conduct of enemy armed merchantmen during the preceding year. The discovery of the orders mentioned now compelled the German Government to draw the conclusions that were to be drawn from such conduct according to the principles of international law. According to the Law of Nations, a merchant vessel making use of her armament *for purposes of attack,* is no longer to be considered as such. On this point there was and there is no difference of opinion. The German Government therefore on February 8th, 1916, issued a white book in which the orders of attack which had fallen into their hands were reproduced, and it was declared that enemy armed merchantmen would thereafter be treated as warfaring vessels. In spite of this declaration the submarines received orders to continue sparing enemy passenger steamers even though they were armed. At the same time, since the British so-called "Blockade" was, in spite of the protest of the United States, being more and more severely and unscrupulously enforced, the submarine war was resumed to a wider extent, without, however, any of the former restrictive orders being cancelled.

In spite of the utmost caution, it was, however, impossible to avoid mistakes, and thus it happened that the steamer "Sussex" fell a victim to a German torpedo. As soon as it had been established beyond doubt that a German submarine was responsible, the German Government issued orders to immediately stop the submarine warfare as contemplated in the war zone declaration and to carry on trade warfare only in accordance with the general principles of international law and the German Prize Ordinance. This order was given on April 24, 1914, and

was communicated to the Government of the United States on May 4, 1916.

This order remained in force until February, 1917, with the exception of certain restrictions which were enacted in the course of the following months.

16.

German Maritime Warfare Outside of the German War Zone.

German maritime warfare outside of the war zone.

Also, outside the war zone, trade war was waged. This warfare, however, was governed by the generally recognized principles of the Law of Nations, and by the provisions of the German Prize Ordinance, which, in the course of time, had undergone certain modifications.

These modifications had become necessary as reprisals against the course followed by the Entente Powers. It could not in fairness be expected of Germany that she would adhere to a law that her enemies had disregarded since the very beginning of the war.

Thus by ordinance of April 18, 1915, the principal contraband rules enacted by England *as early as August and October, 1914,* were adopted, and at the same time the list of contraband articles was correspondingly extended. Apart from the fact, however, that by ordinance of June 3, 1916, the list of conditional contraband was extended by adding a single article, the German Prize Ordinance was not modified until *July 22, 1916.* But even then the London Declaration, which was in fact at no time abrogated by Germany, was substantially adhered to, although England and her allies had abrogated it on July 7, 1916. Apart from the extension of the contraband list, the German Ordinance was confined to adopting the measures that had been taken by Great Britain as early as March, 1916.

III. PERIOD FROM END OF APRIL, 1916, TO FEBRUARY 1, 1917.

1.

Cessation of Submarine War; the British So-called Blockade Remains in Force.

In spite of the cessation of submarine war, the so-called British blockade is further enforced.

From April 24, 1916, Germany's maritime warfare against Great Britain was thus in all parts of the sea restricted to the application of the principles of her own Prize Court Ordinance and of international law.

Although fighting for her very existence, Germany was therefore compelled to renounce the use of the weapon, which alone gave her a possibility of retaliating against the inhuman war of starvation which was being carried on by Great Britain and which had been characterized as unlawful by all neutral countries, including the United States, and thus to break the ban declared against German trade. Germany renounced the use of this weapon in the expectation that her enemies would likewise be foreed to return to the observance of the rules of war, as recognized in the light of International Law before the war and upheld *even by Great Britain. This expectation was all the more justified as the United States Government had in their note of July 23, 1915, explicitly declared to Germany that they would continue to fight for the principles of the Law of Nations at any cost and without compromise, no matter from what side they were violated.*

This expectation was, however, not realized. The British starvation blockade was continued. This blockade had been started as a reprisal against the German submarine war. It has thus been characterized by the Government of the United States in their note of November 5, 1915, as follows:

> "The United States, therefore, cannot submit to the curtailment of its neutral rights by these measures which are admittedly retaliatory and therefore illegal, in conception and in nature, and intended to punish

the enemies of Great Britain for alleged illegalities on their part."

If it, therefore, really was a retaliatory measure the blockade ought to have been discontinued as soon as the alleged ground of retaliation, namely, the German submarine war had ceased, i. e., at the latest from May 4th, 1916. Nothing of the kind however happened. The blockade remained in force, the British military area in the North sea being maintained. This is shown by a note of the Dutch Government of July 26, 1916, in which they lodged a complaint with the British Government because the English Admiralty had ordered the seizure of all Dutch fishing craft *encountered within the prohibited area.*

If the events leading up to the Order in Council of March 11, 1915, go to prove its real purpose, the fact that the blockade of food supplies was not discontinued when submarine warfare was stopped by Germany makes such proof irrefutable. The announcement of the submarine war was merely taken as a pretext to justify the unlawful blockade of Germany and to set aside the rights of neutrals. The purpose of the blockade not having been fulfilled, it was continued in force, although the grounds given for its justification no longer existed.

2.

Submarine Warfare of the Entente Powers.

Submarine warfare of the Entente Powers.

But also Great Britain and her allies were waging a regular submarine war, which differed from the German operations merely in that it was not restricted to a certain defined area, which shipping had been warned not to traverse, and that it was directed indiscriminately against freight vessels, small coastal fishing craft, passenger steamers and hospital ships.

Thus, for instance, the following attacks or sinkings without warning were effected by British submarines in the Dardanelles and in the Sea of Marmora: On May

12th, 1915, the freight vessel "Ittihad"; on May 18, 1915, the passenger steamer "Dogan," which had 700 passengers on board, among which many women and children[40]; on May 25th and 31st, 1915, the freight steamers "Stambul" and "Madelaine Rickmers"; on June 1st, the steamer "Willi Rickmers," which bore the distinguishing marks of a hospital ship; and on July 13th, a tug which was towing a barge full of passengers.

All these vessels had no military character whatever.

Allied submarines in the Adriatic acted in the same manner. In two notes of April 20, and July 12, 1916, the Austro-Hungarian Government notified the various cases to the neutral Governments. According to same, the passenger steamer "Daniel Ernö" was attacked without warning on February 13th, and on April 5th, 1916. The same happened to the passenger steamer "Zagreb" on February 28th, 1916, whereas this vessel was sunk by a torpedo on January 14th, 1917; only 10 persons could be saved, and among the missing were three women. The hospital ship "Elektra" was likewise sunk by a torpedo, without warning, on March 18th, 1916. There were dead and wounded, and among the killed and wounded there were also nurses. The Italian Government tried to exculpate themselves by alleging abnormal conditions of light at the time of sinking. Be that as it may, this attempted exoneration, at any rate, shows that the submarines had the order to attack without warning. Further, there were sunk without warning by torpedoes on May 9th, 1916, the passenger steamer "Dubrovnik," and on July 4th, 1916, the freight vessel "Albanien." In the first case four members of the crew, four passengers and three women were killed; in the other case three members of the crew. Finally, on June 1st, 1916, the coasting steamer "Biocovo" was twice attacked by torpedoes without warning.

It is to be pointed out that a number of these cases, as shown by the dates, occurred after May 4th, 1916.

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[40] On May 7, 1915, the "Lusitania" had been sunk.

The protest of the Austro-Hungarian Government was also intimated to the Government of the United States; of any measure taken against this kind of warfare, nothing has, however, been heard.

To these examples there are to be added all cases in which allied submarines attacked or sunk by torpedoes without warning during the summer of 1916, German steamers in the Baltic Sea, mostly in Swedish territorial waters; thus, on June 17th, 1916, the steamer "Kolga"; on July 16th, 1916, the steamer "Syria"; on July 19th, 1916, the steamer "Elbe"; on August 24th, 1916, the steamer "Schwaben."

Furthermore, several steamers disappeared in the Baltic, nothing being known as to the cause of their sinking. In view, however, of the fact that the "Times" on November 12th, 1916, published a statement to the effect that British submarines had destroyed a total of 53 steamers and 197 sailing vessels, and that this number considerably exceeds the losses known to the German Government as caused by allied submarines, a certain suspicion as to the cause of the disappearance of German steamers in the Baltic Sea appears justified.

3.

Interference with the Shipment of Medical Supplies to Germany in Violation of Special Agreements.

Interference with the shipment of medical supplies to Germany in violation of special agreements.

A further feature of the warfare pursued by the allied Powers is worthy of notice, namely, the war against wounded and invalids. Upon the initiative of the King of Spain and of the Government of the United States, an agreement was entered into between the belligerent powers towards the end of 1915, *i. e.*, after the so-called blockade had been declared, according to which certain articles used exclusively for the treatment of wounded and sick were to be considered as non-contraband, within the meaning of the London Declaration, and consequently to be assured free transport by sea. *Even this agreement*

was ignored by the British Government, who forbade the American Red Cross to ship such articles to the German Red Cross, and disregarded a protest of the former President of the United States, Mr. Taft. It should not be forgotten in this connection that Great Britain in 1916 had in a like manner rejected a request of American philanthropists who wished to send milk to Germany for infants. The request was disallowed, in spite of the fact that the American Red Cross was willing to take charge of the distribution of the milk in Germany, and the German Government had given an assurance in writing that this milk would not be requisitioned.

Such are the features of the maritime warfare as waged by the allied Powers, which from the outbreak of the war had in view only one aim, namely, to bring Germany to submission by starving her civilian population. Against such methods Germany after April 26th, 1916, had been compelled to refrain from using the only weapon available to her by way of retaliation.

4.

Germany's Situation at the End of 1916; Offer of Peace and Consequence of its Rejection.

Germany's situation at the end of 1916.

The sufferings of the innocent population of Germany were constantly increasing, in particular from the beginning of 1916. The effect of inadequate food-rations, reduced to a minimum on account of the blockade, on the life and health of the Nation, was becoming increasingly appalling. Mortality among women, children, invalids and the aged—in particular, however, among infants—increased in the most shocking manner. The disastrous consequences of the British war of starvation have been revealed by statements of medical authorities. It may suffice here to quote the following excerpts from an article by Professor Doctor Rubner, of Berlin University, published in the "Deutsche Allgemeine Zeitung" of January 29th, 1919:

"The autumn of 1916 brought a general collapse

in the food supplies of the large cities; animal products almost completely ceased to be available, at least for the adult population. The general diet became monotonous, deficient in albumen and fats, and hard to digest. The caloric value of the so-called 'rations' for adults at some times was scarcely 1/3 of normal consumption.

"During the Spring of 1917 the dangers menacing the health of the Nation assumed terrible proportions, and were also reflected very clearly in statistics. The strict censorship prevailing at the time prevented any discussion of the food question, and suppressed all information as to the numerous deaths occurring in public institutions and hospitals. Only very gradually it became possible for medical experts to discuss the problem *in camera*, in particular the appearance of a hunger œdema. The extent of the evil was made surprisingly evident by the progressive increase of mortality among the civil population. At first this increase was noted among persons over fifty years of age, but later on younger people were also afflicted, and finally even the youngest classes. Observations made recently have shown that even breast-fed infants were seriously affected. It may be stated in general that on account of inadequate nourishment thousands, and even millions, of people were so reduced in their physical power of resistance that they succumbed to all kinds of diseases, from which they otherwise would have recovered. Thus within a period of practically two years the hard-gained peace-time successes in the fight against tuberculosis were rendered nugatory."

At the same time, Germany had to witness the spectacle of Great Britain's being able, with practically no interference, to import war materials in unlimited quantities from almost all parts of the world. In particular in the United States of America the entire industry and trade of the country was being more and more organized to supply the Entente Powers with every conceivable kind of war materials.

German Offer of Peace and the consequences of its rejection.

Under these conditions, the German Government, in order to put an end to the fearful sufferings of the war, resolved to announce formally their willingness to conclude Peace, which had in other ways previously been

shown often enough. In spite of the fact that she stood on the crest of her military successes, Germany in December, 1916, submitted to the Allied Powers the well-known offer of peace.

This offer was rejected in a form which could not have been more degrading. Likewise the almost simultaneous offer of mediation on the part of the United States was declined. If the war aim of the Allies had already been revealed clearly enough by the utterances of their press in those days, as also in official statements of their ministers, as that of Mr. Winston Churchill, cited above, to make "alterations on the map of Europe," this purpose was now openly avowed in their note in reply to the American offer of mediation. Germany was to submit, in order to be then annihilated. Territorial adjustments were to be made, offering protection to the land and sea boundaries of the Entente Powers, against unjustified attacks. Here for the first time the intention of the Allied Powers was announced in an official declaration to make the annexation of the Rhine Province, contemplated in the secret agreements between France and Russia, a common purpose of the war.

Now no longer any doubt could exist that Germany was fighting for her existence. Germany was in a position of self-defence. *Her government had, therefore, now not only the right, but also the duty, to apply all her forces and all available means of defence in order to ward off the strangling grip of the inhuman blockade which was leading to her starvation.* This was, besides capitulation and submission to the terms of the Allies, the only alternative remaining. In their note of May 4th, 1916, whereby the American Government was informed of the cessation of submarine warfare, the German Government had intimated their expectation that the Government of the United States would be successful in inducing also Germany's enemies to return to the observance of the rules of the Law of Nations, as universally accepted before the war. They based this expectation upon the repeated statements of the American Government

to the effect that the United States was firmly resolved to re-establish the freedom of the seas against all belligerents. But the German Government had at the same time expressly intimated that should the steps to be taken by the American Government fail to have the expected results, Germany would have to act in accordance with the new situation created.

Such new situation had arisen. Almost eight months elapsed, during which the Government of the United States had failed to undertake the steps contemplated. The Allied Powers continued their unlawful and inhuman starvation blockade, without interference. The war had to be brought to an end within reasonable time, if the German nation was to be spared irreparable damage. That could only be achieved if Germany's enemies were menaced to such a degree as to cause them likewise to seek an understanding.

5.

German War Zone Declaration of January 31, 1917, and its Justification.

Unrestricted submarine warfare and its justification.

To attain this end and to avoid becoming guilty of a breach of their duties, the German Government had now to apply the measure that alone offered hope of bringing the war to a speedy conclusion.

It was under these circumstances that the German Government on January 31, 1917, declared unrestricted warfare. Self-defence necessitated this action, and not the intention to annihilate the enemy, as was the aim of the British blockade. The German action was a measure of self-defence against a life peril, and was intended to compel the enemy to give up their unlawful war of starvation. The submarine warfare was a war of defence, and nothing else. It did not serve any ulterior motive, as was the case with the so-called British Blockade, but was merely a justified measure of self-defence.

Self-defence consists in the resort to all such means as are necessary to afford protection against an unlawful at-

tack. The exercise of self-defence does not become unlawful by the fact of its interfering with the rights of third parties whenever such interference is necessary to secure protection against the unlawful attack. Nor does self-defence become unlawful by the fact of its employing the means available in the most effective manner, because only under such conditions can the attack be successfully warded off. For such is the sole object of self-defence, and that is the reason why this right has gained recognition in the law of all nations.

The right of self-defence as developed above is also recognized by International Law. Its principles were observed in the conduct of submarine warfare of Germany. Opportunity was afforded to neutral States to protect their interests. A further consideration of neutral interests after the time limit provided for their protection had expired, would have impaired the chances of success for the act of self-defence from the outset. The submarine could, in the circumstances, under the compulsion of which Germany was acting, only be employed in the manner prescribed by the special character of this weapon.

The submarine was a new weapon of maritime warfare. Attempts to prohibit their employment by International Law had failed at the Hague Conference, and such failure had not been due to the opposition of Germany. New weapons, however, bring about new situations and create new requirements, which call forth the development of new rules of law, governing and justifying their employment. This principle of International Law was invoked by the Government of the United States in their notes to the British Government of March 5th and 30th, 1915, where it was admitted that on account of the possibility of submarines being employed the carrying through of a blockade in the manner formerly in use might become impossible, and that, therefore, new methods might be resorted to. If, however, it is lawful and in accordance with the Law of Nations to carry through a blockade in a new manner, because the

creation of new weapons would make a blockade carried through under the old methods ineffective, it ought to be equally lawful and legitimate to resort to such use of the new weapon as alone permits of its full exploitation. In any case, the principle of impartiality, which binds neutral States more than any other rule, demands that the consequences arising from the creation of a new weapon be not countenanced to the advantage of *one* of the belligerents only.

Contrary to the attitude taken towards the so-called British Blockade, the War Zone Declaration of Germany against Great Britain was objected to on the grounds that its application violated the principles of humanity in that it tended to endanger the life of those on board the ship encountered. This criticism is not justified, because it is one-sided and is based only on the outward appearance of the problem, without entering into the kernel. Among the measures taken by the British Government, the most prominent was obviously the blockade of the North Sea. This blockade, however, was primarily based on the danger threatening all ships which entered the prohibited area in contravention to the rules enacted. If no lives were lost here, it has not been due to the circumstances that the British barred area had created no dangers, but merely to the fact that shipping avoided these dangers, either by refraining from entering into the barred zone or by strictly complying with the British regulations in passing such zone.[41] Thus both the Ger-

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[41] Public opinion in Great Britain and the United States on this point is best illustrated in an article published in the "Daily News" of March 31, 1917, by its editor, Mr. Gardiner. He quotes from the "New Republic," which he states to be one of the most influential papers in the United States and at the same time a paper upholding the policy of the President, the following:

"It is true that we have allowed the allied powers to stop all importations into Germany, while we have been delivering to the Allies munitions and food supplies. The Germans have from the beginning appreciated the situation correctly. Many circumstances have contributed to obscure these facts. In the first place no American lives have been lost through acts of the allied powers, and their unlawful practices have therefore failed to appear to us as atrocious. But let us leave the question of

man submarine war and the so-called British Blockade aimed at isolating the enemy by the creation of danger zones. The two measures, therefore, do not show any substantial difference.

That, however, is the question at issue; and for the decision of this question it is of no relevancy that in the one case the measures announced had actually to be carried out, whilst in the other case such action could be dispensed with, on account of the fact that the third parties threatened by such action had already yielded to the threat, without trying to resist. The reproach of inhuman conduct must, therefore, be raised either against both Great Britain and Germany, or is not to be raised at all.

6.

Conclusion.

In his message to Congress on April 4, 1917, the President of the United States gave utterance to the following words:

> "The German Government have swept aside the last vestige of legality under the pretext of reprisals and compulsion, and, because they had no other weapon available at sea than this particular one. It is, however, impossible to make such a use of this weapon as Germany is making without casting to the winds all considerations of humanity and all respect for agreements, which, after all, are the foundations on which International relations rest. I am not considering now the loss of property entailed by such practices, however great and grave such loss may be, but I consider only the reckless destruction

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humanity out of discussion. If we had made the same concessions to the German policy, as we have made to the British and had declined to recognize the British 'blockade,' as we refused to recognize the German War Zone, American lives would certainly have been lost. When Great Britain demanded that we should call at a certain port, we did so. When Great Britain demanded that we should refrain from taking a certain route in the North Sea, we refrained from doing so. When Great Britain demanded that we should subject our trade with Holland to certain restrictions, we submitted to such restrictions."

> of lives of non-combatants, of women and children, engaged in activities that even in the darkest times of the new era have always been considered as innocent and legitimate. Property can be replaced; the life of peaceful and innocent men cannot be replaced."

These words of the message were directed against German warfare as waged under the most bitter compulsion. But does not all which is here said apply with equal force to British warfare? Had not the Government of the United States raised this same reproach against Great Britain in repeated protests? Had not the American Government declared that British warfare was unlawful; that a neutral State that did not want to become guilty of a breach of neutrality could not submit to such warfare being waged? Had not the American Government as early as March 30, 1915, declared in a protest note addressed to the British Government that:

> "To admit it would be to assume an attitude of unneutrality toward the present enemies of Great Britain, which would be obviously inconsistent with the solemn obligations of this Government"?

That it is inhuman to expose by unlawful means an entire population to death by starvation, is self-evident, and had, moreover, been emphatically voiced, as has already been recited above, by the American Secretary of State, Mr. Sherman, in 1897, in a note protesting against the intention of the Spanish Government to starve out Cuba. Whether the property of German subjects destroyed down to the end of the year 1916 by the unlawful warfare of the allied powers, the Entente, could be restored, is doubtful, but it is without doubt that the lives of all the innocent German women, infants, children, infirm and aged persons who have fallen victims to the inhuman war of starvation can never be replaced; that the havoc wrought to the health of the German people, and consequently to their productive capacity, can never be made good. Had, therefore, not the German

nation the right to rely upon the same considerations, at least after the submarine war was stopped in May, 1916? Had not the German people the right to demand that their Government protect them with all weapons available, after the allied powers had rejected the German offers of Peace and had openly declared as their war aim the annihilation of Germany? Germany, after the rejection of her offer of Peace, was confronted by the danger of certain starvation, if she did not resort to all means available to shorten the war, if she did not bring to bear against her enemies the same weapons adopted by them, in order to compel them to come to an understanding. The danger was all the more imminent as a change in the situation brought about by the intervention of the greatest of all neutral States—the country that alone was in a position to exercise the necessary pressure, and the country whose Government had repeatedly declared that to submit to the situation created would be a breach of neutrality—could no longer be hoped for.[42]

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[42] How little such hope was justified is shown by the statement made by Sir Edward Carson in the British House of Commons on March 27, 1917:

"I found this—that in the way in which the matter had been arranged by the Foreign Office the blockade was enormously assisted by the agreement they had entered into and the arrangement they had made in America—which is, of course, the chief neutral and chief exporting country—by which they had secured in a friendly way that the United States Government should be satisfied that a large number of the ships which were sailing for neutral countries in Europe should have their cargoes examined and certificates given before they came into European waters at all. If it were not for that, the blockading squadron at the present moment would have to go out and insist upon every single ship coming into port for examination. That would be almost impossible; certainly it would be impossible with the force we have now; but this arrangement has been of the greatest benefit to this country, not merely by lightening the burdens of the navy, but in preventing friction with America and with the Scandinavian countries."

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